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THE ACTS

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SECOND ISSUE.

THE NEW SYSTEM
OF
PRACTICE AND PLEADING
UNDER THE SUPREME COURT OF
JUDICATURE ACTS, 1873, 1875, 1877,
THE APPELLATE JURISDICTION ACT, 1876,
AND THE
RULES OF THE SUPREME COURT.

BY

WILLIAM THOS. CHARLEY, D.C.L., M.P.,

Of the Inner Temple, Esq., Barrister-at-Law, late Exhibitioner of the Council of
Legal Education, Author of a Treatise on "The Real Property Acts,
1874, 1875, and 1876," &c.

THIRD EDITION.



LONDON:

WATERLOW AND SONS LIMITED,

LONDON WALL, GREAT WINCHESTER STREET, AND PARLIAMENT STREET.

—
1877.

TO

T. HENRY BAYLIS, Esquire,

ONE OF HER MAJESTY'S COUNSEL,

JUDGE OF THE LIVERPOOL COURT OF PASSAGE,

WHO UNITES TO AN INTIMATE ACQUAINTANCE WITH THE SYSTEM OF

PRACTICE AND PLEADING OF THE SUPERIOR COURTS OF LAW UNDER THE

COMMON LAW, PROCEDURE ACTS, A PRACTICAL KNOWLEDGE OF

THE SCIENCE OF SPECIAL PLEADING,

AS IT EXISTED ANTERIOR TO THOSE ACTS, THIS ATTEMPT TO ILLUSTRATE

AND EXPLAIN THE

NEW SYSTEM OF PRACTICE AND PLEADING UNDER THE

SUPREME COURT OF JUDICATURE ACTS,

IS (WITH PERMISSION) INSCRIBED BY

HIS AFFECTIONATE PUPIL.

.

•

PREFACE TO THE FIRST EDITION.

* * * * *

By means of short annotations to every section and every Rule of the new Acts, I have endeavoured, in a very simple and unpretending way, but, I trust, with a due regard to accuracy of quotation and reference, to explain the New System of Pleading and Practice, and to point out the changes effected by it in the previously existing law. The work is the result of severe and sustained labour. I am fully conscious of its many imperfections and shortcomings, but, such as it is, I submit it to the Public and the Profession, hoping that it may prove of some slight use to them in their efforts to unravel the intricacies of the fusion of the once rival, but at length blended, systems of procedure in Law and Equity.

W. T. C.

5, CROWN OFFICE ROW, TEMPLE,
October 1st, 1875.

PREFACE TO THE SECOND EDITION.

*

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*

I attribute the demand for the work not so much to its possession of any intrinsic merits—although, as I have already stated, it is “the result of severe and sustained labour,”—but to the circumstance that it is the cheapest law book ever published. It is due to the enterprise and public spirit of Messieurs Waterlow, that the humblest law clerk * can possess a copy of an annotated edition of the Supreme Court of Judicature Acts, and of all the Orders issued under them, printed in excellent type. This is noteworthy, in view of the recent efforts of Parliament to provide the Public with cheap law.

*

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*

W. T. C.

TEMPLE CHAMBERS,
ST. JAMES'S SQUARE, MANCHESTER,
Nov. 16th, 1875.

* L. T., October 30th, 1875. 7,500 copies of the First and Second Editions were sold.

PREFACE TO THE THIRD EDITION.

I HAVE endeavoured, in the preparation of this Edition, to present the new System of Pleading and Practice to the Public and to the Profession in as complete a form as possible. To copy in marginal notes from reports is an easy and rapid task; but to *analyse* many hundreds of decided cases, and distribute the various points contained in each of them under the appropriate sections of the Supreme Court of Judicature Acts and Rules of the Supreme Court, is a work of some difficulty and magnitude; and it has occupied many more months than I had originally anticipated. I sincerely regret the delay which has occurred.

In this Edition, besides the decided cases, will be found the new Rules of Court, Orders, and Notices, issued by Authority. They are reproduced *in extenso*, and references to and extracts from them have been also inserted in appropriate places.

The Acts of Parliament, Rules of Court, Orders, and Notices, have been reprinted in chronological sequence, a method of arrangement which, I submit, is best calculated to throw light on their true construction. The authority, whether legislative, administrative, or judicial, by which these Acts, Rules, Orders and Notices have been framed, seems to me a matter of minor importance.

At the risk of appearing presumptuous, I have ventured occasionally to criticise the decisions of our new tribunals, and to point out, where there are conflicting decisions, the one which it has seemed desirable to follow.

References have been inserted, wherever practicable, to

all the reports of every case in the *Law Reports*, *Law Journal*, *Law Times*, *Weekly Reporter*, *Weekly Notes*, *Notes of Cases*, and, occasionally, the *Times*; but it has been thought unnecessary to give a reference to a report of a case in the *Law Reports* or *Law Journal*, and also in the *Weekly Notes* or *Notes of Cases*. If a reference to any of the Reports has escaped me, it has been through an unintentional oversight.

The great length of the work has necessitated sending the earlier portion of it to press before the rest was completed. The cases in the Schedule to the Supreme Court of Judicature Act, 1875, have, therefore, been brought down to a more recent period than those cited under the Acts themselves.

A complete Table of Cases, a broad margin for entering up new cases as they arise, and the addition of an indication, at the top of the margin, of the Act and section, or of the Order and Rule—are new features, which, it is hoped, will facilitate the use of the work by the reader.

The Index has been entirely re-arranged, re-written and much amplified by Mr. Cyril Williams, of the Judgment Office of the Queen's Bench Division, whose timely aid in this department of the work I desire gratefully to acknowledge.

Typographical errors, notwithstanding repeated revises of the proof-sheets of the work, will, no doubt, be detected. Errors, also, of a more serious nature, will, perhaps, be discovered. As accuracy has throughout been my constant aim, and I have not shrunk from any pains to secure it, I trust that the reader will take a lenient view of any errors, whether of a grave or of a more venial kind, which he may succeed in detecting in the following pages.

W. T. C.

5, CROWN OFFICE ROW, TEMPLE,
October, 1877.

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SUPREME COURT OF JUDICATURE ACT, 1873.

38 & 37 VICTORIA, CHAPTER 66.

An Act for the constitution of a Supreme Court, Act 1873.
and for other purposes relating to the better
Administration of Justice in England;

And to authorise the transfer to the Appellate Division of such Supreme Court of the Jurisdiction of the Judicial Committee of Her Majesty's Privy Council.

[5th August, 1873.]

As sections 21 and 55 of the present Act, which relate to the Judicial Committee, were suspended by the 2nd section of the Supreme Court of Judicature, 1875, till the 1st of November, 1876, the latter part of the title to this Act was similarly suspended. Sections 21 and 55 of the present Act are now repealed by section 24 of the Appellate Jurisdiction Act, 1876; and the latter part of the title is, therefore, virtually repealed also.

WHEREAS it is expedient to constitute a Supreme Court, and to make provision for the better administration of Justice in England:

And whereas it is also expedient to alter and amend the law relating to the Judicial Committee of Her Majesty's Privy Council.

The latter clause of the Preamble was suspended till the 1st of November, 1876, and is now virtually repealed by the Appellate Jurisdiction Act, 1876, s. 24.

1873.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

PRELIMINARY.

SECTION 1.—*Short Title.*

This Act may be cited for all purposes as "The Supreme Court of Judicature Act, 1873."

By section 1 of the Supreme Court of Judicature Act, 1877, it is provided that this Statute and the Supreme Court of Judicature Acts, 1875 and 1877, may be cited together as "The Supreme Court of Judicature Acts, 1873, 1875, 1877."

By the Rules of the Supreme Court, December, 1875, the Rules in the first Schedule to the Act of 1875, may be cited separately as "The Rules of the Supreme Court." The Rules subsequently issued in pursuance of the powers conferred by section 17 of the Act of 1875 may be cited separately in the same manner, but with the addition of the year and month in which they were respectively issued, thus, "The Rules of the Supreme Court, June, 1876."

SECTION 2.—*Commencement of Act.*

This Act, except any provision thereof which is declared to take effect on the passing of this Act, shall commence and come into operation on the second day of November, 1874.

By the Statute 37 and 38 Vict., cap. 83, "Supreme Court of Judicature (Commencement) Act, 1874," section 1, this section is repealed. By section 2 of that Act, it is provided that the Supreme Court of Judicature Act, 1873, except any provisions thereof directed to take effect on the passing of that Act, shall commence and come into operation on the first day of November, 1875, and the said first day of November, 1875, shall be taken to be the time appointed for the commencement of the said Act

The Supreme Court of Judicature (Commencement) Act was passed at the close of the Session of 1874, on account of the withdrawal of the Supreme Court of Judicature (1873) Amendment Bill. The competing claims of the Scottish Church Patronage Bill, the English Public Worship Bill, and the Endowed Schools Bill led to its withdrawal. The Supreme Court of Judicature (Commencement) Act, 1874, is not affected by the Supreme Court of Judicature Act, 1875; but by the 2nd section of the last-mentioned Act it is provided that that Act, except any provision of it which is declared to take effect beforehand, shall commence and come into operation on the 1st day of November, 1875, the same day as that fixed by the Supreme Court of Judicature (Commencement) Act, 1874, for the coming into operation of the Supreme Court of Judicature Act, 1873.

Act 1873,
s. 2.

The words in the present section, "except any provision thereof which is declared to take effect on the passing of this Act," refer to section 25, subsects. (1) and (7), but see s. 10 of the Amending Act; section 27 (empowering Her Majesty to make Orders in Council regulating Vacations); section 60 (enabling the Queen to establish District Registries); and section 68 (as to making Rules of Court before the commencement of the Act by Order in Council), which, however, is repealed by section 17 of the Amending Act.

PART I.

CONSTITUTION AND JUDGES OF SUPREME COURT.

SECTION 3.—*Union of existing Courts into one Supreme Court.*

From and after the time appointed for the commencement of this Act, the several Courts hereinafter mentioned (that is to say), the High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the

Act 1873,
s. 3.

Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, shall be united and consolidated together, and shall constitute, under and subject to the provisions of this Act, one Supreme Court of Judicature in England.

The "Practice and Procedure" in "Divorce and other Matrimonial Causes" are, by the express provisions of Order LXII. of the Rules of the Supreme Court, to remain unaffected by the Supreme Court of Judicature Acts, notwithstanding that "the Court for Divorce and Matrimonial Causes" is, by the present section, made an integral part of the Supreme Court of Judicature.

Section 33 of the Supreme Court of Judicature Act, 1875, and the second Schedule to that Act, repeal so much of this section as relates to the London Court of Bankruptcy. See also ss. 16 and 34 of this Act, *infra*. The substituted provisions will be found in section 9 of the Amending Act, by which it is declared that the Principal Act shall be construed as if the jurisdiction of the London Court of Bankruptcy had not been transferred by it to the High Court of Justice.*

This section is founded on the following recommendation of the Judicature Commission † :—

"We are of opinion that the defects which we have adverted to cannot be completely remedied by any mere transfer or blending of jurisdiction between the Courts as at present constituted; and that the first step towards meeting and surmounting the evils complained of will be the *consolidation* of all the Superior Courts of Law and Equity, together with the Courts of Probate, Divorce and Admiralty, into one Court to be called 'Her Majesty's Supreme Court,' in which Court shall be vested all the jurisdiction which is now exercisable by each and all of the Courts so consolidated. This consolidation would at once put an end to all conflicts of jurisdiction. No suitor would

* The position assigned to the London Court of Bankruptcy by the Amending Act was the subject of comment in the House of Commons in 1875.

† First Report (1869), p. 9.

be defeated because he commenced his suit in the wrong Court, and sending the suitor from equity to law and from law to equity to begin his suit over again, in order to obtain redress, will be no longer possible.” Act 1873
s. 3.

“ I propose,” said Lord Selborne, C., when introducing the Supreme Court of Judicature Bill, 1873, “ to ask your lordships to unite in one Supreme Court of Judicature all the present Superior Courts of Common Law and Equity and also the Probate and Divorce Court, the Admiralty Court and the London or Central Court of Bankruptcy. I do not mean to elevate any of the Inferior Courts so as to unite them to the Superior Courts ; but it is proposed to abolish two Common Law Jurisdictions, the Courts of Pleas of the Counties Palatine of Lancaster and Durham ; they will be merged in the jurisdiction of the High Court.”

The only alteration in the scheme, as stated by Lord Selborne, is the retention, as already mentioned, of the London Court of Bankruptcy as a separate Court.

One consequence of the consolidation of the Superior Courts into one Court is that jurymen are now summoned to serve in the High Court of Justice, not in any particular Division of it.*

The Judges of the Court of Chancery being now Judges of the High Court of Justice, of which the Common Pleas is now a Division, it follows that where a judgment has been recovered in the Common Pleas Division against a person interested in a fund in the Chancery Division, a stop order will be granted to the judgment creditor by a Vice-Chancellor, without a preliminary charging order having been obtained in the Common Pleas Division.†

SECTION 4.—*Division of Supreme Court into a Court of Original and a Court of Appellate Jurisdiction.*

The said Supreme Court shall consist of two permanent Divisions, one of which, under the

* *Pearson v. Fisher ; Fisher v. Pearson and another ; Times*, Dec. 21st, 1875 ; 1 *Charley's Cases* (Court), 1.

† *Hopewell v. Barnes*, 1 Ch. D. 630 ; 2 *Charley's Cases* (Court), 1.—See also Order XLV., Rule 1, of the Rules of the Supreme Court.

1873,
s. 4.

name of “Her Majesty’s High Court of Justice,” shall have and exercise original jurisdiction with such appellate jurisdiction from Inferior Courts as is hereinafter mentioned, and the other of which, under the name of “Her Majesty’s Courts of Appeal,” shall have and exercise appellate jurisdiction, with such original jurisdiction, as hereinafter mentioned, as may be incident to the determination of any appeal.

As to appeals from Inferior Courts, see section 45, *infra*

This section, as framed in 1873, had a different meaning from that which attaches to it now. It was then intended to be an exhaustive division of the supreme judicature of the kingdom, but it now leaves untouched the jurisdiction of the Final Courts of Appeal, the “Court of Appeal” being only an *intermediate* Court of Appeal.

This section is founded on a recommendation of the Judicature Commission :—“ We propose that in the place of the Court of Exchequer Chamber and of the Court of Appeal in Chancery, both which Courts, as now constituted, would cease to exist, there should be established, *as a part of the Supreme Court*, a Court of Appeal.” This Court of Appeal was to be an *intermediate* Court of Appeal, and it is a noteworthy fact, which it is only fair to the government of the Earl of Beaconsfield to mention, that the Supreme Court of Judicature Act, 1875, while it departs from the scheme of Lord Selborne, which transferred to the new Court of Appeal the appellate jurisdiction of the House of Lords, and, to some extent, that of the Judicial Committee of the Privy Council also, legislates upon the lines laid down in the Report of the Judicature Commission. The Court of Appeal mentioned in the present section represents the former Court of Appeal in Chancery and the Court of Exchequer Chamber. The Court of Appeal mentioned in the present section, as originally passed, was the *sole* Court of Appeal for England. It was not, however, while changing the meaning of the name, thought necessary to

alter the name, "Court of Appeal," as it has now precisely the meaning which the Judicature Commission intended it should have. Act 1873,
s. 4.

SECTION 5.—*Constitution of High Court of Justice.*

Her Majesty's High Court of Justice shall be constituted as follows :—The first Judges thereof shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the several Vice-Chancellors of the High Court of Chancery, the Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes, the several Puisne Justices of the Courts of Queen's Bench and Common Pleas respectively, the several Junior Barons of the Court of Exchequer, and the Judge of the High Court of Admiralty, except such, if any, of the aforesaid Judges as shall be appointed Ordinary Judges of the Court of Appeal.

Subject to the provisions hereinafter contained, whenever the office of a Judge of the said High Court shall become vacant, a new Judge may be appointed thereto by Her Majesty by Letters Patent. All persons to be hereinafter appointed to fill the places of the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and their successors respectively, shall

8, continue to be appointed to the same respective offices, with the same precedence, and by the same respective titles, and in the same manner, respectively, as heretofore. Every Judge who shall be appointed to fill the place of any other Judge of the said High Court of Justice shall be styled in his appointment, "Judge of Her Majesty's High Court of Justice," and shall be appointed in the same manner in which the Puisne Justices and Junior Barons of the Superior Courts of Common Law have been heretofore appointed : *Provided always, that if at the commencement of this Act the number of Puisne Justices and Junior Barons who shall become Judges of the said High Court shall exceed twelve in the whole, no new Judge of the said High Court shall be appointed in the place of any such Puisne Justice or Junior Baron who shall die or resign while such whole number shall exceed twelve, it being intended that the permanent number of Judges of the said High Court shall not exceed twenty-one.*

All the Judges of the said Court shall have in all respects, save as in this Act is otherwise expressly provided, equal power, authority, and jurisdiction, and shall be addressed in the manner which is now customary in addressing the Judges of the Superior Courts of Common Law.

The Lord Chief Justice of England for the time being shall be President of the said High Court of Justice in the absence of the Lord Chancellor.

There are two curious *errata* in this section : the word in the proviso to the second paragraph "the permanent number of Judges of the said High Court" having been inserted by mistake for "the number permanent Judges of the said High Court." This r

take was corrected by section 3 of the Amending Act, as originally framed.

Act 1873,
s. 5.

In the first paragraph of the present section, again, there are twenty-two Judges enumerated, *including the Lord Chancellor*, while, in the second paragraph the intention of the Legislature is stated to be that the total number of Judges “shall not exceed twenty-one!” Section 3 of the Amending Act, as originally framed, set this right by stating, that in the construction of section 5 of the Principal Act, the Lord Chancellor should be “deemed to be [a] permanent Judge of the High Court.”

The 3rd section of the Amending Act was subsequently altered, in deference to the feeling of the House of Commons into a simple repeal of the proviso to the second paragraph of the present section, with the addition of a statement to the effect that “the Lord Chancellor shall not be deemed to be a permanent Judge of the High Court, and the provisions of the said section relating to the appointment and style of the Judges of the said High Court shall not apply to the Lord Chancellor.”*

It will be perceived that “the Judge of the High Court of Admiralty” is made a Judge of the High Court of Justice by the present section. The 8th section of the Amending Act, after pointing out that the Judge of the High Court of Admiralty was “inferior in position, as to salary and pension,” to the other Puisne Common Law Judges, placed him on the same footing with them in these respects, on condition that he signified to the Lord Chancellor, in writing, before the commencement of the Act, his willingness to relinquish the “ecclesiastical and other offices” which he held in addition to the office of Judge of Admiralty, and resigned “all other offices of emolument,” accordingly, before the same date. Sir Robert Phillimore, the Judge of the High Court of Admiralty, fulfilled the condition on which his elevation depended, and is now a Judge of the High Court of Justice, on the same footing with the Puisne Judges.

“Judge of Her Majesty’s High Court of Justice.” By

* See, however, the note to section 3 of the Amending Act. Section 15 of the Appellate Jurisdiction Act, 1876, has virtually restored the repealed paragraph of the present section.

Act 1873,
s. 5.

section 4 of the Supreme Court of Judicature Act, 1877, which came in force on the 24th of April, 1877, the Judges of the High Court of Justice, other than the Presidents of Divisions, are to be styled "Justices of the High Court."

An important alteration in the number of Puisne Judges was made by the Appellate Jurisdiction Act, 1876. At the time at which that Act was passed, the total number of Judges of the Common Law Divisions of the High Court was 18. The Parliamentary Elections Act, 1868, section 11, empowered Her Majesty to "appoint an additional Puisne Judge to each of the Courts of Queen's Bench, and Common Pleas, and the Exchequer," and this power was subsequently exercised by the Queen, who thereby raised (much to the benefit of the public) the number of Common Law Judges from 15 to 18. The 15th section of the Appellate Jurisdiction Act, 1876, reduced the number of common law judges, back again, from 18 to 15. This provision of the Appellate Jurisdiction Act was not contained in the measure as originally introduced by the Lord Chancellor into the House of Lords, nor, indeed, in the Bill as originally introduced by the Attorney-General into the House of Commons. It formed part of the scheme for strengthening the Court of Appeal, suggested by Sir Henry James, Q.C., when the Bill was going into Committee in the House of Commons. The scheme was that three additional "Ordinary" Judges should be appointed to the Court of Appeal, by transferring to it three Puisne Judges from the three Common Law Divisions of the High Court of Justice. The vacancies created by the transfer were not to be filled up, except gradually, as the paid Judgeships of the Judicial Committee of the Privy Council should lapse. This economical arrangement was adopted by the Attorney-General, and incorporated in the Appellate Jurisdiction Act. The reason alleged for declining to fill up the vacancies was that under section 17 of that Act, there would be such a saving of Judge-power in the Common Law Divisions, as would enable 15 Judges of those Divisions to get through as much judicial work as 18 Judges of those divisions previously did.* Under sections

* See the debate on this subject in Hansard's Parliamentary Debates, 3rd Series, vol. 230, pp. 982, 983, 1144—1159; and vol. 231, pp. 858—868.

2 and 3 of the Supreme Court of Judicature Act, 1877, an Additional Judge of the Chancery Division of the High Court has been appointed to remedy the block in *that* Division.

Act 1873,
n. 5.

SECTION 6.—*Constitution of Court of Appeal.*

9. *Her Majesty's Court of Appeal shall be constituted as follows :—There shall be five ex officio Judges thereof, and also so many Ordinary Judges (not exceeding nine at any one time) as Her Majesty shall from time to time appoint. The ex officio Judges shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer. The first Ordinary Judges of the said Court shall be the existing Lords Justices of Appeal in Chancery, the existing salaried Judges of the Judicial Committee of Her Majesty's Privy Council, appointed under the "Judicial Committee Act, 1871," and such three other persons as Her Majesty may be pleased to appoint by Letters Patent : such appointment may be made either within one month before or at any time after the day appointed for the commencement of this Act, but if made before shall take effect at the commencement of this Act.*

Besides the said ex officio Judges and Ordinary Judges, it shall be lawful for Her Majesty (if she shall think fit), from time to time to appoint, under Her Royal Sign Manual, as Additional Judges of the Court of Appeal, any persons who, having held in England the office of a Judge of the Superior Courts of Westminster hereby united and consolidated, or of Her Majesty's Supreme Court hereby constituted, or in Scotland the office of Lord Justice General or Lord Justice Clerk, or in Ireland the office of Lord Chancellor or Lord Justice of Appeal, or in India the office of Chief Justice of the High Court of Judicature at Fort William in Bengal, or Madras, or Bombay, shall respectively signify in writing their willingness to serve as such Additional Judges in the Court of Appeal. No such Additional Judge shall be deemed to have undertaken the duty of sitting in the Court of Appeal when prevented from so doing by attendance in the House of Lords, or on the discharge of any other public duty, or by any other reasonable impediment.

The Ordinary and Additional Judges of the Court of Appeal shall be styled "Lords Justices of Appeal." All the Judges of the said Court shall have, in all respects, save as in this Act is otherwise expressly mentioned, equal power, authority and jurisdiction.

Whenever the office of an Ordinary Judge of the Court of Appeal becomes vacant, a new Judge may be appointed thereto by Her Majesty by Letters Patent.

The Lord Chancellor for the time being shall be President of the Court of Appeal.

This section is repealed by the Supreme Court of Judi-

Act 1873,
s. 6.

cature Act, 1875, section, 33, and the second Schedule that Act. The substituted provisions will be found section 4 of the Amending Act.

A severe controversy long raged round the important question whether there should be one Court of Appeal only, or two—an Intermediate Court of Appeal and a Final Court of Appeal. The question has now been decided in favour of a double appeal. In 1873, Lord Cairns expressed himself as follows on this question :—

“It is extremely plausible to say that there shall only one appeal, but *I doubt whether the principle is quite sound*. Great injustice may be done if the single appeal is insisted on; and it must not be forgotten that a third Court has great advantages over a first Appeal Court. The arguments to be submitted to it are more mature and better understood, and the judgments of the Judges can be considered side by side, and can be corrected. I am not ignorant of the danger of multiplying appeals, but my objection is that you may go too far in the opposite direction.” *

SECTION 7.—*Vacancies by resignation of Judges and effect of Vacancies generally.*

The office of any Judge of the said High Court of Justice, or of the said Court of Appeal, may be vacated by resignation in writing, under his hand, addressed to the Lord Chancellor, without any deed of surrender; and the office of any Judge of the said High Court shall be vacated by his being appointed a Judge of the said Court of Appeal. The said Courts respectively shall be deemed to be duly constituted during and notwithstanding any vacancy in the office of any Judge of either of such Courts.

* See as to this subject, Hansard's Parliamentary Debates, 3rd Series, Vol. 214, p. 364.

The following Judges of the High Court of Justice have been appointed Ordinary Judges of the Court of Appeal:—Mr. Baron Bramwell, Mr. Justice Brett, and Mr. Baron Amphlett. The latter has resigned.

Act 1873,
s. 7.

“Judge of the said Court of Appeal.” This must be understood only of “Ordinary”—not of *ex officio* Judges of the Court of Appeal.

SECTION 8.—*Qualifications of Judges. Not required to be Serjeants-at-Law.*

Any barrister of not less than ten years' standing shall be qualified to be appointed a Judge of the said High Court of Justice; and any person who, if this Act has not passed, would have been qualified by law to be appointed a Lord Justice of the Court of Appeal in Chancery, or has been a Judge of the High Court of Justice of not less than one year's standing, shall be qualified to be appointed an Ordinary Judge of the said Court of Appeal: Provided, that no person appointed a Judge of either of the said Courts shall henceforth be required to take, or to have taken, the degree of Serjeant-at-Law.

By s. 1 of the 14 & 15 Vict. c. 83, the qualification of a Lord Justice is stated to be “the being or having been a barrister of fifteen years' standing.”

“One year's standing.” Sect. 15 of the Appellate Jurisdiction Act, 1876, fixed “two years' standing” as the minimum qualification of a Judge of the High Court to be transferred to the Court of Appeal under that Act.

A curious result of the Judges ceasing to take the degree of the *coif* is that they will continue, after their appointment, to be members of their respective Inns of Court, instead of becoming, as heretofore, members of Serjeants' Inn; and if they are not only members, but also benchers, of

Act 1873,
s. 8.

their respective Inns of Court, they will hear appeals, as Judges, from their own decisions as benchers.*

In consequence of the present section, the Serjeants have sold Serjeants' Inn to Mr. Serjeant Cox, distributing the nett proceeds among themselves. There are 38 surviving members of Serjeants' Inn, of whom no fewer than 20 are Judges who took the degree of the coif on ascending the Judicial Bench. No barrister has been appointed a Serjeant since 1868.†

SECTION 9.—*Tenure of office of Judges, and oaths of office. Judges not to sit in the House of Commons.*

All the Judges of the High Court of Justice, and of the Court of Appeal respectively, shall hold their offices for life, subject to a power of removal by Her Majesty, on an Address presented to Her Majesty by both Houses of Parliament. No Judge of either of the said Courts shall be capable of being elected to, or of sitting in, the House of Commons. Every Judge of either of the said Courts (other than the Lord Chancellor) when he enters on the execution of his office, shall take, in the presence of the Lord Chancellor, the oath of allegiance, and judicial oath as defined by the Promissory Oaths Act, 1868. The oaths to be taken by the Lord Chancellor shall be the same as heretofore.

The section is repealed by the Supreme Court of Judicature Act, 1865, section 33, and the second Schedule to that Act. The substituted provisions will be found in the 5th section of the Supreme Court of Judicature Act, 1875. The repealed section of this Act is re-enacted, with the addition of the words "with the exception of the Lord Chancellor," after the word "respectively," and with the substitution of the words "during good behaviour," for the words "for life."

SECTION 10.—*Precedence of Judges.*

The ex officio Judges of the Court of Appeal shall rank in the Supreme Court in the order of their present respective official precedence. The other

* To obviate this, the Middle Temple passed a resolution that a bencher of that Inn, becoming a Judge, should, *ipso facto*, cease to be a bencher; but this resolution has since been rescinded.

† The reader, who wishes to pursue the history of Serjeants-at-Law, is referred to "The Legal Profession," pp. 48—57. (London: Ridgway, 169, Piccadilly.)

Judges (whether Ordinary or Additional) of the Court of Appeal shall rank in the Supreme Court, if Peers or Privy Councillors, in the order of their respective precedence; and the rest of the Judges of the Court of Appeal shall rank according to the priority of their respective appointments to be Judges thereof.

**Act 1878,
s. 10.**

The Judges of the High Court of Justice, who are not also Judges of the Court of Appeal, shall rank next after the Judges of the Court of Appeal, and among themselves (subject to the provisions hereinafter contained as to existing Judges), according to the priority of their respective appointments.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule to that Act. The substituted provisions will be found in the 6th section of the Amending Act. The words “or Additional” are omitted, as the “Additional Judges” under s. 4 of the Act of 1875, unlike Additional Judges under (the repealed) s. 6 of the present Act, continue to rank according to their position in the Court from which they are taken.

SECTION 11.—*A saving of rights and obligations of existing Judges.*

Every existing Judge, who is by this Act made a Judge of the High Court of Justice or an Ordinary Judge of the Court of Appeal shall, as to tenure of office, rank, title, salary, pension, patronage, and powers of appointment or dismissal, and all other privileges and disqualifications, remain in the same condition as if this Act had not passed; and, subject to the change effected in their jurisdiction and duties by or in pursuance of the provisions of this Act, each of the said existing Judges shall be capable of performing and liable to perform all duties which he would have been capable of performing or liable to perform in pursuance of any Act of Parliament, law, or custom if this Act had not

Act 1873,
s. 11.

passed. No Judge appointed before the passing of this Act shall be required to act under any Commission of Assize, Nisi Prius, Oyer and Terminer, or Gaol Delivery, unless he was so liable by usage or custom at the commencement of this Act.

Service as a Judge in the High Court of Justice or in the Court of Appeal, shall, in the case of an existing Judge, for the purpose of determining the length of service entitling such Judge to a pension on his retirement, be deemed to be a continuation of his service in the Court of which he is a Judge at the time of the commencement of this Act.

This is one of the transition clauses of this Act.

The 8th section of the Amending Act, after referring to the 5th section of this Act, and reciting the first paragraph of this section, places the Judge of the High Court of Admiralty on the same footing "as to salary and pension" as "the other Puisne Judges of the Superior Courts of Common Law," on condition that he resign "before the commencement of this Act all other offices of emolument which he holds in addition to the office of Judge of the High Court of Admiralty." If he comply with this condition, his service is to be "reckoned in the same manner as if the High Court of Justice had been established at the time of his accepting the office of Judge of the High Court of Admiralty, and he had continued for such time to be a Judge of the High Court of Justice." Sir Robert Philimore (as already stated) complied with the condition. (See note to section 5.)

The present section *protects* the existing Judges of the Chancery Division and of the Probate, Divorce and Admiralty Division, appointed before the passing of this Act, from liability to go circuit. Section 8 of the Amending Act *imposes* a liability to go circuit on all Judges of the

Probate, Divorce and Admiralty Division appointed after the passing of that Act. Act 1873,
s. 11.

The liability to go circuit was not, until recently, imposed upon any of the Ordinary Judges of the Court of Appeal, the Courts held on circuit being, under section 16 of the present Act, an integral portion of the High Court of Justice only, and not forming any part of the Court of Appeal.* But by section 15 of the Appellate Jurisdiction Act, 1876, the curious anomaly is introduced of the three new Judges of Appeal being “under an obligation to go circuits” (*sic*), thus diminishing, *pro tanto*, the advantage to be derived from their accession to the Court of Appeal, and incapacitating them (by the operation of section 4 of the Amending Act) from sitting on certain appeals, *i.e.*, on appeals from their own decisions on circuit.

SECTION 12.—*Provisions for extraordinary duties of Judges of the former Courts.*

If, in any case not expressly provided for by this Act, a liability to any duty, or any authority or power, not incident to the administration of justice in any Court, whose jurisdiction is transferred by this Act to the High Court of Justice, shall have been imposed or conferred by any statute, law, or custom upon the Judges or any Judge of any such Courts, save as hereinafter mentioned, every Judge of the said High Court shall be capable of performing and exercising, and shall be liable to perform and empowered to exercise every such duty, authority, and power, in the same manner as if this Act had not passed, and as if he had been duly appointed the successor

* See also sections 29 and 37 of this Act, which speak only of Judges of the High Court going Circuit.

Act 1873,
s. 12.

of a Judge liable to such duty, or possessing such authority or power, before the passing of this edict. Any such duty, authority, or power, imposed or conferred by any statute, law, or custom, in any such case as aforesaid, upon the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, or the Lord Chief Baron, shall continue to be performed and exercised by them respectively, and by their respective successors, in the same manner as if this Act had not passed.

This is one of the transition clauses of this Act.

SECTION 13.—*Salaries of future Judges.*

Subject to the provisions in this Act contained with respect to existing Judges, there shall be paid the following salaries, which shall in each case include any pension granted in respect of any public office previously filled by him, to which the Judge may be entitled:

To the Lord Chancellor, the sums hitherto payable to him;

To the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, the same annual sums which the holders of those offices now respectively receive;

To each of the Ordinary Judges of the Court of Appeal; and,

To each of the other Judges of the High Court of Justice, the sum of five thousand pounds a year.

Act 1873,
s. 18.

No salary shall be payable to any Additional Judge of the Court of Appeal appointed under this Act; but nothing in this Act shall in any way prejudice the right of any such Additional Judge to any pension to which he may be by law entitled.

Section 33 of the Supreme Court of Judicature Act, 1875, and the second Schedule to that Act, repeal so much of this section as relates to Additional Judges of the Court of Appeal.

The salary of the Lord Chancellor is fixed at £10,000 per annum; of the Lord Chief Justice of England at £8,000; of the Master of the Rolls at £6,000; of the Lord Chief Justice of the Common Pleas at £7,000; and of the Lord Chief Baron at £7,000. £5,000 is the salary of a Puisne Judge, including the new Puisne Judge under the Act of 1877.

By s. 15 of the Appellate Jurisdiction Act, 1876, each of the three new Judges of the Court of Appeal, appointed under that Act, is to receive, in addition to his salary as an Ordinary Judge of that Court, "such sum on account of his expenses on circuit as may be approved by the Treasury upon the recommendation of the Lord Chancellor."

The salary of a Lord of Appeal in Ordinary is, by section 6 of the Appellate Jurisdiction Act, 1876, fixed at £6,000 per annum.*

SECTION 14.—*Retiring pensions of future Judges of High Court of Justice, and Ordinary Judges of Court of Appeal.*

Her Majesty may, by Letters Patent, grant to any Judge of the High Court of Justice, or to any Ordinary Judge of the Court of Appeal who has served for fifteen years as a Judge in such Courts

* See as to Judges' salaries, the statutes 14 & 15 Vict. c. 41 (amending 2 & 3 Will. IV. c. 116), and 14 & 15 Vict. c. 83.

Act 1873,
s. 14.

or either of them, or who is disabled by permanent infirmity from the performance of the duties of his office, a pension, by way of annuity, to be continued during his life :

In the case of the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, the same amount of pension which at present might under the same circumstances be granted to the holder of the same office :

In the case of any Ordinary Judge of the Court of Appeal or any other Judge of the High Court of Justice, the same amount of pension which at present might under the same circumstances be granted to a puisne Justice of the Court of Queen's Bench.

The pension payable to the Lord Chief Justice of England is £4,000 per annum ; to the Master of the Rolls £3,750 ; to the Lord Chief Justice of the Common Pleas, £3,750 ; to the Lord Chief Baron, £3,750 ; and to a Puisne Judge, £3,500.*

SECTION 15.—*Salaries and Pensions how to be paid.*

Subject to the provisions in this Act contained with respect to existing Judges, the salaries, allowances, and pensions payable to the Judges of the High Court of Justice, and the Ordinary

* See 39 Geo. III. c. 110, s. 7 ; 53 Geo. III. c. 153, s. 1 ; and 6 Geo. IV. cc. 82, 83 and 84, as to Judges' pensions. The provisions of the present section apply to the three new Judges appointed to the Court of Appeal under sect. 15 of the Appellate Jurisdiction Act, 1876, and to the new Puisne Judge under the Supreme Court of Judicature Act, 1877.

Judges of the Court of Appeal respectively, shall be charged on and paid out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland, or the growing produce thereof; such salaries and pensions shall grow due from day to day, but shall be payable to the persons entitled thereto, or to their executors or administrators, on the usual quarterly days of payment, or at such other periods in every year as the Treasury may from time to time determine.

Act 1873,
s. 15.

This section is copied from the statute 39 Geo. III. c. 100, s. 7.

PART II.

JURISDICTION AND LAW.

SECTION 16.—*Jurisdiction of High Court of Justice.*

The High Court of Justice shall be a Superior Court of Record, and, subject as in this Act mentioned, there shall be transferred to and vested in the said High Court of Justice the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any of the Courts following: (that is to say),

- (1.) The High Court of Chancery, as a Common Law Court as well as a Court of Equity, including the Jurisdiction of the Master of the Rolls, as a Judge or Master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a Common Law Court;

Act 1873,
s. 16.

- (2.) The Court of Queen's Bench ;
- (3.) The Court of Common Pleas at Westminster ;
- (4.) The Court of Exchequer, as a Court of Revenue, as well as a Common Law Court ;
- (5.) The High Court of Admiralty ;
- (6.) The Court of Probate ; *
- (7.) The Court for Divorce and Matrimonial Causes ;
- (8.) *The London Court of Bankruptcy.*
- (9.) The Court of Common Pleas at Lancaster ;
- (10.) The Court of Pleas at Durham ;
- (11.) The Courts created by Commission of Assize, of Oyer and Terminer, and of Gaol Delivery, or any of such Commissions :

The jurisdiction by this Act transferred to the High Court of Justice shall include (subject to the exceptions hereinafter contained) the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any one or more of the Judges of the said Courts respectively, sitting in Court or chambers, or elsewhere, when acting as Judges or a Judge, in pursuance of any statute, law, or custom, and all powers given to any such Court, or to any such Judges or Judge, by any statute; and also all ministerial powers, duties, and authorities, incident to any and to every part of the jurisdictions so transferred.

* See *Nicholas v. Dracachis*, 1 P. D., 72.

As to the constitution of the High Court of Justice, Act 1873,
s. 16.
see sect. 5, *supra*.

Section 33 of the Supreme Court of Judicature Act, 1875, and the Schedule to that Act, repeal so much of this section as relates to the London Court of Bankruptcy. See also section 3, *supra*, and section 34, *infra*, of this Act. The substituted provisions will be found in section 9 of the Amending Act.

The jurisdiction over the Register of Patent Proprietors which was conferred on the Master of the Rolls by the 15 & 16 Vict. c. 83, s. 38, can be no longer exercised by him, having been transferred to the High Court of Justice by subsection (1) of this section.*

SECTION 17.—*Jurisdiction not transferred to High Court.*

There shall not be transferred to or vested in the said High Court of Justice, by virtue of this Act,—

- (1.) Any appellate jurisdiction of the Court of Appeal in Chancery, or of the same Court sitting as a Court of Appeal in Bankruptcy:
- (2.) Any jurisdiction of the Court of Appeal in Chancery of the County Palatine of Lancaster:
- (3.) Any jurisdiction usually vested in the Lord Chancellor, *or in the Lords Justices of Appeal in Chancery, or either of them*, in relation to the custody of the person and estates of idiots, lunatics, and persons of unsound mind:
- (4.) Any jurisdiction vested in the Lord Chancellor in relation to grants of Letters Patent, or the issue of commissions or

* *In Re Morgan's Patent*, 24 W.R., 245; 2 Charley's Cases (Court), 2.

Act 1873,
s. 17.

other writings, to be passed under the Great Seal of the United Kingdom :

- (5.) Any Jurisdiction exercised by the Lord Chancellor in right of or on behalf of Her Majesty as visitor of any College, or of any charitable or other foundation :
- (6.) Any jurisdiction of the Master of the Rolls in relation to records in London or elsewhere in England.

See, as to subsections (1) and (2), the next section of this Act, subsections (1) and (2).

Although by sections 9 and 33, and the second Schedule of the Amending Act of 1875, the London Court of Bankruptcy is severed from the High Court of Justice, subsection (2) of section 9 of that Act expressly provides that "appeals from the London Court of Bankruptcy shall lie to the Court of Appeal, as provided by the Principal Act"—i.e., by the present section of it. (See section 18 of the Amending Act as to Rules and Orders of Court in force "in relation to appeals from the Chief Judge in Bankruptcy, or from the Court of Appeal in Chancery in Bankruptcy matters.")

As to subsection (3), see sect. 51 of this Act and sect. 7 of the Amending Act, and *In Re Lamotte*.*

SECTION 18.—*Jurisdiction transferred to Court of Appeal.*

The Court of Appeal established by this Act shall be a Superior Court of Record, and there shall be transferred to and vested in such Court all jurisdiction and powers of the Courts following: (that is to say),

- (1.) All jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in

* 25 W. R., 149.

Chancery, in the exercise of his and its appellate jurisdiction, and of the same Court as a Court of Appeal in Bankruptcy : Act 1873,
s. 18.

- (2.) All jurisdiction and powers of the Court of Appeal in Chancery of the County Palatine of Lancaster, and all jurisdiction and powers of the Chancellor of the Duchy and County Palatine of Lancaster when sitting alone or apart from the Lords Justices of Appeal in Chancery as a Judge of rehearing or appeal from decrees or orders of the Court of Chancery of the County Palatine of Lancaster :
- (3.) All jurisdiction and powers of the Court of the Lord Warden of the Stannaries assisted by his assessors, including all jurisdiction and powers of the said Lord Warden when sitting in his capacity of Judge :
- (4.) All jurisdiction and powers of the Court of Exchequer Chamber :
- (5.) All jurisdiction vested in or capable of being exercised by Her Majesty in Council, or the Judicial Committee of Her Majesty's Privy Council, upon appeal from any judgment or order of the High Court of Admiralty, or from any order in lunacy made by the Lord Chancellor, or any other person having jurisdiction in lunacy.

As to the constitution of the Court of Appeal, see sect. 4 of the Amending Act.

The 9th section of the Amending Act severs the London Court of Bankruptcy from the High Court of Justice ;

Act 1873,
s. 18.

but it at the same time provides that "the appeal from the London Court of Bankruptcy shall lie to the Court of Appeal in accordance with the Principal Act."

Subsection (1). "In the exercise of its appellate jurisdiction." Section 4 of this Act confers on the Court of Appeal "such original jurisdiction as may be incidental to the determination of any appeal," and by Order LVIII., Rule 5, "the Court of Appeal is to have all the powers and duties as to amendment and otherwise of the Court of First Instance." The hearing of a second winding-up petition cannot be said to be incidental to the determination of an appeal from an order made on a first winding-up petition. It may, indeed, be broadly stated that the Court of Appeal has no jurisdiction to hear an original petition.*

The Court of Appeal has also no jurisdiction to order the enrolment of a decree of the Court of Chancery, enrolled previous to the first of November, 1875, to be vacated.† See, however, *Hastie v. Hastie*.‡

The Lords Justices of Appeal, not being members of the High Court of Justice, cannot even give leave to file an affidavit in the Chancery Division of that Court.§

Subsection (3). "The Court of the Lord Warden." Error did not lie to the Superior Courts from the Vice-Warden; but by 18 and 19 Vict. c. 32, s. 26, an appeal from all decrees and orders of the Vice-Warden on the Equity side of the Court, and from all judgments of the Vice-Warden on the Common Law side of it, lay to the Lord Warden (assisted by two or more Assessors, members of the Judicial Committee of the Privy Council, or Judges of the High Court of Chancery, or Courts of Common Law at Westminster), and from the Lord Warden, a final appeal lay to the Judicial Committee.

Subsection (4). "All jurisdiction of the Exchequer

* *Re the Dunraven Adare Coal and Iron Company*, 33 L. T., 371; 24 W. R., 37; 1 Charley's Cases (Court), 2. All the parties were willing in this case that the original petition should be heard by the Court of Appeal.

† *Allan v. The United Kingdom Electric Telegraph Company, Limited*, 45 L. J. (Ch.), 366; 24 W. R., 898; 2 Charley's Cases (Court), 10.

‡ 2 Ch. D., 304; 45 L. J. (Ch.), 304.

§ *Glover v. The Greenbank Alkali Company*, W. N., 1876, p. 157; 2 Charley's Cases (Court), 9.

Chamber.” The Divisional Court of Appeal from Inferior Courts, created by sect. 45 of this Act, has no jurisdiction to hear an appeal from a judgment of the Lord Mayor’s Court, upon a demurrer to pleadings, but the Court of Appeal has, under this subsection, jurisdiction to hear it.*

Act 1873,
s. 18.

Subsection (5). As to this subsection, see sect. 2 of the Amending Act, and the note thereto.

SECTION 19.—*Appeals from High Court.*

The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty’s High Court of Justice, or of any Judges or Judge thereof, subject to the provisions of this Act, and to such Rules and Orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act.

For all the purposes of, and incidental to, the hearing and determination of any appeal within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority, and jurisdiction by this Act vested in the High Court of Justice.

The Rules of Court relating to appeals will be found in Order LVIII. of the Rules of the Supreme Court, *infra*. See also section 4 of this Act, and the note to section 18.

* *Le Blanch v. Reuter’s Telegram Company Limited*, 1 App. Cas., 408; 1 Charley’s Cases (Court), 5.

Act 1873,
s. 19.

“Save as hereinafter mentioned.” This more particularly points to section 47, *infra*, where it is expressly enacted that “no appeal shall lie from any judgment of the High Court in any cause or matter, save for some error of law apparent on the record.” The 19th section of the Act of 1875 provides that “the practice and procedure in all criminal causes and matters shall be the same as before the commencement of the Act.” Order LXII. of the Rules of the Supreme Court further provides that “nothing in the Rules shall affect the practice or procedure in any criminal proceedings or in proceedings on the Crown side of the Queen’s Bench Division.”

In view of these enactments the Court of Appeal, in the recent case of *Regina v. Steel*,* held that no appeal lies to that Court from a decision of the Queen’s Bench Division of the High Court discharging a rule to review the taxation of the defendant’s costs by the Master under the 6 and 7 Vict. c. 98, s. 8, on the trial of a criminal information for libel, in which a verdict of “Not Guilty” has been found. In the still more recent case of *Regina v. Fletcher*† the Court of Appeal, in view of the same enactments, and of the decision in *Regina v. Steel*, held that no appeal lies to that Court from a decision of the Queen’s Bench Division, discharging a rule for a *certiorari* to bring up a summary conviction under the 1 and 2 Will. IV. c. 32, s. 30, for trespass by day in pursuit of game, for the purpose of quashing it for want of jurisdiction.

For further exceptions from the right of appeal under the present section, to which the words “save as hereinafter mentioned” point, reference may be made to sects. 45, 49 and 50 of this Act, *infra*.

By section 20 of the Appellate Jurisdiction Act, 1876, it is enacted, that, “where by Act of Parliament it is provided that the decision of any Court or Judge, the jurisdiction of which Court or Judge is transferred to the High Court of Justice, is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice, or any Judge thereof, to her Majesty’s Court of Appeal.”

* 2 Q. B. D., 37; 46 L. J. (M. C.), 1; 25 W. R., 34; 35 L. T., 534.

† 2 Q. B. D., 43; 46 L. J. (M. C.), 4; 35 L. T., 538.

By the 23 & 24 Vict. c. 144, either party dissatisfied with the decision of the Judge Ordinary of the Divorce Court in granting or refusing a new trial, may appeal to "the full Court," whose decision *shall be final*. In the recent case of *Westhead v. Westhead and Gordon*,* Mr. Inderwick, Q.C., drew the attention of the Court of Appeal to these enactments, and also to the present section, and moved, *ex parte*, for a rule to shew cause why a new trial should not be directed. The motion was by way of appeal from the refusal of the President of the Probate, Divorce and Admiralty Division (Hannen, J.) to grant a rule for a new trial. The Court of Appeal refused to hear the motion, on the ground that they had no jurisdiction. The appeal lay to the "full Court" below, whose decision was to be final. This decision has been followed in *Gladstone v. Gladstone*,† *Robinson v. Robinson*,‡ and *Wallis v. Wallis*.§

Act 1873,
s. 19.

Except as specified in sections 4 and 18, the present section, and Order LVIII., the jurisdiction of the Court of Appeal is purely appellate, and not, like that of the Lords Justices formerly, a superintending jurisdiction. An application, therefore, to the Court of Appeal, to order the Registrars of the Chancery Division of the High Court to set down an action in that Division for trial by jury, was refused.¶

Neither can the Court of Appeal interfere with the exercise of the discretion of a Judge of the Chancery Division in refusing to release a person whom he had sent to prison for contempt of Court.¶¶

An order of a Judge at Assizes, that an action entered for trial before him should be struck out of the lists, is not appealable to the Court of Appeal, although the action has been sent down for trial at the Assizes by the Master of the Rolls, pursuant to Order XXXVI., Rule 29.**

The Court of Appeal, following in this respect the prin-

* 2 P. D., 1; 25 W. R., 35.

† 25 W. R., 387.

‡ 25 W. R., 388.

§ 25 W. R., 387.

¶ *Garling v. Royds*, *Times*, Wednesday, August 2nd, 1876; 2 Charley's Cases (Court), 12.

¶¶ *Smith v. Lewis*, *Times*, Wednesday, August 9th, 1876; 2 Charley's Cases (Court), 15.

** *Cave v. Mackenzie*, W. N., 1876, p. 237; 11 N. C., 161; 2 Charley's Cases (Court), 11.

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s. 19.

ciple laid down by the Privy Council, will not, except in a case of overwhelming pressure, reverse a decision of a Judge of the Admiralty Division, where he has come to a conclusion of fact upon conflicting testimony, and after hearing in open Court and observing the demeanour of the witnesses. Where, however, the Judge's decision is founded upon inferences drawn from the evidence by the Judge, it will, if erroneous, be reviewed, and will, without great pressure, if necessary, be reversed by the Court of Appeal.*

The Court of Appeal, under this section, has all the powers vested in the Divorce Court by the Divorce Act, 1860, s. 5.†

SECTION 20.—*No appeal from High Court or Court of Appeal to House of Lords or Judicial Committee.*

No error or appeal shall be brought from any judgment or order of the High Court of Justice, or of the Court of Appeal, nor from any judgment or order, subsequent to the commencement of this Act, of the Court of Chancery of the County Palatine of Lancaster, to the House of Lords or to the Judicial Committee of Her Majesty's Privy Council; but nothing in this Act shall prejudice any right existing at the commencement of this Act to prosecute any pending writ of error or appeal, or to bring error or appeal to the House of Lords or to Her Majesty in Council, or to the Judicial Committee of the Privy Council, from any prior judgment or order of any Court whose jurisdiction is hereby transferred to the High Court of Justice or to the Court of Appeal.

It has been so frequently stated that this section passed unchallenged in the House of Commons in 1873, that it may not be out of place here to state that a division, in which the writer acted as "teller," took place upon the clause in the Committee on the Bill in the House of Commons on the 3rd of July, 1873. The numbers were, for the clause 154; against, 93. In the minority the names appear of 14 members of the present Government, and also the name of the present Chairman of Committees. It is only fair to the present Government that this fact should be

* *The "Transit,"* 1 P. and D., 282; 2 Charley's Cases (Court), 29; *Bigsby v. Dickinson*, 4 Ch. D., 24; 25 W. R., 89.

† *Le Sueur v. Le Sueur*, W. N., 1877, p. 61.

thus prominently noticed. In the face of the remarkable movement in favour of preserving the Appellate Jurisdiction of the House of Lords, which was originated by the formation of the Appellate Jurisdiction Committee by the writer,* and which developed itself so rapidly and simultaneously in the legal profession and in both Houses of Parliament in 1874-5, it would have been a mere waste of time for the Government to have attempted to force this clause in the Session of 1875 on the Legislature. The most natural course would have been to repeal it. By way of conciliating, however, the authors of the clause, the Government proposed that it should be simply suspended for a year, and this was accepted on all sides as a reasonable compromise. This suspension was effected by the second section of the Supreme Court of Judicature Act, 1875.

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The section was finally repealed by section 24 of the Appellate Jurisdiction Act, 1876, without any opposition on the part of any member of the two Chambers of the Legislature.†

The provisions framed in lieu of the present section will be found in sects. 3 to 13, and the Interpretation Clause (section 25) of the Appellate Jurisdiction Act, 1876.

SECTION 21.—*Power to transfer Jurisdiction of Judicial Committee by Order in Council.*

It shall be lawful for Her Majesty, if she shall think fit, at any time hereafter, by Order in Council to direct that all Appeals and Petitions whatsoever to Her Majesty in Council, which according to the laws now in force ought to be heard by or before the Judicial Committee of Her Majesty's Privy Council, shall from and after a time to be fixed by such Order be referred for hearing to and be heard by Her Majesty's Court of Appeal; and from and after the time fixed by such Order, all such Appeals and Petitions shall be referred for hearing and to be heard by the said Court of Appeal accordingly, and shall not be heard by the said Judicial Committee; and for all the purposes of and incidental to the hearing of such Appeals or Petitions, and the reports to be made to Her Majesty thereon, and all orders thereon to be afterwards made by

* The writer, also, originated the Memorial from the Bar of England to the Lord Chancellor in favour of the preservation of the Appellate Jurisdiction.

† Baron Redesdale has been created Earl of Rodesdale, in connection with the part which he took in the preservation of the Appellate Jurisdiction of his House.

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Her Majesty in Council, and also for all purposes of and incidental to the enforcement of any such Orders as may be made by the said Court of Appeal or by Her Majesty, pursuant to this section (but not for any other purpose), all the power, authority, and jurisdiction now by law vested in the said Judicial Committee shall be transferred to and vested in the said Court of Appeal.

The Court of Appeal, when hearing any appeals in Ecclesiastical Causes which may be referred to it in manner aforesaid, shall be constituted of such and so many of the Judges thereof, and shall be assisted by such assessors being Archbishops or Bishops of the Church of England, as Her Majesty, by any General Rules made with the advice of the Judges of the said Court, or any five of them (of whom the Lord Chancellor shall be one), and of the Archbishops and Bishops who are members of Her Majesty's Privy Council, or any two of them (and which General Rules shall be made by Order in Council), may think fit to direct : Provided that such Rules shall be laid before each House of Parliament within forty days of the making of the same, if Parliament be then sitting, or if not, then within forty days of the commencement of the then next ensuing session ; and if an address is presented to Her Majesty by either House of Parliament within the next subsequent forty days on which the said House shall have sat, praying that any such Rules may be annulled, Her Majesty may thereupon by Order in Council annul the same ; and the Rules so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same.

The operation of this section was like that of the last, suspended until the first day of November, 1876, by the second section of the Supreme Court of Judicature Act, 1875.

The section was finally repealed by the 24th section of the Appellate Jurisdiction Act, 1876. The new provisions in lieu of it will be found in the 14th section of the Appellate Jurisdiction Act, 1876, and in the Order in Council under that Act, dated November 28th, 1876.*

SECTION 22.—*Transfer of pending business.*

From and after the commencement of this Act the several jurisdictions which by this Act are transferred to and vested in the said High Court of Justice and the said Court of Appeal respec-

* The Appellate Jurisdiction Act and the Order in Council of the 28th November, 1876, will be found *infra*.

tively, shall cease to be exercised, except by the said High Court of Justice and the said Court of Appeal respectively, as provided by this Act, and no further or other appointment of any Judge to any Court whose jurisdiction is so transferred shall be made except as provided by this Act: Provided, that in all causes, matters and proceedings whatsoever which shall have been fully heard, and in which judgment shall not have been given, or having been given shall not have been signed, drawn up, passed, entered, or otherwise perfected at the time appointed for the commencement of this Act, such judgment, decree, rule, or order may be given or made, signed, drawn up, passed, entered, or perfected respectively, after the commencement of this Act, in the name of the same Court, and by the same Judge and officers, and generally in the same manner, in all respects, as if this Act had not passed; and the same shall take effect, to all intents and purposes, as if the same had been duly perfected before the commencement of this Act: and every judgment, decree, rule, or order of any Court whose jurisdiction is hereby transferred to the said High Court of Justice or the said Court of Appeal, which shall have been duly perfected at any time before the commencement of this Act, may be executed and enforced, and, if necessary, amended or discharged, by the said High Court of Justice and the said Court of Appeal respectively, in the same manner as if it had been a judgment, decree, rule, or order

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of the said High Court or of the said Court of Appeal; and all causes, matters, and proceedings whatsoever, whether civil or criminal, which shall be pending in any of the Courts whose jurisdiction is so transferred as aforesaid at the commencement of this Act, shall be continued and concluded, as follows (that is to say), in the case of proceedings in error or appeal, or of proceedings before the Court of Appeal in Chancery, in and before Her Majesty's Court of Appeal; and, as to all other proceedings, in and before Her Majesty's High Court of Justice. The said Courts respectively shall have the same jurisdiction in relation to all such causes, matters, and proceedings, as if the same had been commenced in the said High Court of Justice, and continued therein (or in the said Court of Appeal, as the case may be) down to the point at which the transfer takes place; and so far as relates to the form and manner of procedure, such causes, matters, and proceedings, or any of them, may be continued and concluded, in and before the said Courts respectively, either in the same or the like manner as they would have been continued and concluded in the respective Courts from which they shall have been transferred as aforesaid, or according to the ordinary course of the said High Court of Justice and the said Court of Appeal respectively (so far as the same may be applicable thereto) as the said Courts respectively may think fit to direct.

This is one of the transition clauses of this Act.

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"Causes, matters, and proceedings pending." An *ex parte* application to set down a "pending cause" for hearing under the old practice was refused.*

Where a decree has been pronounced by the Court below, but no petition of appeal has been presented before the 1st of November, 1875, the appeal is not a "proceeding pending."†

Where a bill, filed before the 1st of November, 1875, has been amended subsequent to that date, the suit is a "proceeding pending." (A demurrer to the amended bill in this case, on the ground that, being virtually an action for money had and received, it was not within the jurisdiction of a Court of Equity, was overruled, there being no longer any Courts of Equity.)‡

Two actions, one brought by A and the other by B against C, in respect of injuries sustained by A and B in an accident that occurred through C's negligence, resulted in verdicts for C. Final judgment was signed in July, 1874, and in September, 1874, B paid the costs in his action. A and B both gave due notice of appeal, but B did not proceed with his appeal until after A's appeal had been heard, in November, 1875. On January 18th, 1876, B gave due notice of appeal, and his appeal came on for hearing under the Supreme Court of Judicature Act, 1875. Held, that although a year had elapsed since judgment had been signed, B's right to appeal was not barred by Order LVIII., Rule 15, as, under the special circumstances of the case, it was a "pending appeal" within the meaning of s. 22 of the Supreme Court of Judicature Act, 1873.§

As to the meaning of the words "as the said Courts respectively may think fit to direct," see *Hall v. The London and North Western Railway Company*.||

A declaration delivered on the 2nd November, 1875,

* *Perkins v. Slater*, 1 Ch. D., 83; 45 L. J. (Ch.), 225; 1 Charley's Cases (Court), 6.

† *Bartlam v. Yates*, 1 Ch. D., 13; 34 L. T., 366; 1 Charley's Cases (Court), 5.

‡ *Vagg v. Shippey*, 10 N. C., 196; 1 Charley's Cases (Court), 8; *Times*, Dec. 16th, 1875.

§ *Taylor v. Greenhalgh*, 24 W. R., 311; 2 Charley's Cases (Court), 2).

|| 1 Charley's Cases (Court), 9; *Times*, Nov. 4th, 1876.

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was ordered to be amended, in lieu of delivering a statement of claim, so as to make it as specific with regard to the facts as a statement of claim would be.*

An application by a defendant to proceed under the new practice for the purpose of claiming a set-off against the plaintiff and contribution from a co-defendant, was allowed by Huddleston, B., in an action on a contract.†

An application to proceed under the new practice for the purpose of making a third person, who was alleged to be the real plaintiff, a party, was granted by Quain, J., in an action by a broker against an insurance company on a policy of insurance.‡

Where two declarations were delivered on the 1st of November, 1875, and directions had been given, in the one case, to proceed under the new practice, and in the other, under the old, Lush, J., refused to alter the directions that had been given.§

An application on the 5th of November, 1875, for leave to deliver a declaration, drawn some time previous to the 1st of November, 1875, was refused by Lush, J., on the ground that the declaration should have been delivered sooner. The new practice applied.||

An application for leave to deliver a statement of defence, instead of pleas, in the action for the breach of a covenant in a lease of a furnished house, in which the declaration was delivered on the 1st of November, 1875, and contained all the facts that would have been necessary for a statement of claim, was granted.¶

An application for leave to deliver a statement of defence, where the declaration had been delivered before the 1st of November, 1875, and the defendant desired to take out a summons to refer under the new practice, was granted.**

Where the declaration, in an action on a bond against a surety, was delivered before the 1st of November, 1875, an application by the defendant for leave to proceed under the new practice on an affidavit that he had a good equitable

* *Barrow v. Cooke*, 1 Charley's Cases (Chambers), 3.

† *Harrison v. Markins*, 1 Charley's Cases (Chambers), 4.

‡ *Clarkson v. The British and Foreign Marine Insurance Company*, 1 Charley's Cases (Chambers), 4.

§ 1 Charley's Cases (Chambers), 2.

¶ 1 Charley's Cases (Chambers), 2.

|| *Ib.*, 1.

** *Ib.*, 3.

defence, without showing what that defence was, was refused on the 24th of January, 1876.*

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An application by the defendant for leave to proceed under the new practice, in order to deliver a counter-claim, in an action for "goods bargained and sold" (plea "never indebted"), commenced before the 1st of November, 1875, and remitted to the County Court, was, on the 5th of February, 1876, refused.†

N.B. The intention of the general direction of the 3rd of November, 1875, is that issue in a Chancery suit must be joined under the new practice, without first filing affidavits, at the time when notice of motion for decree would have been given under the old practice. Affidavits, however, may be filed in a "pending suit," by leave or by consent, before issue joined.‡

As to the mode of making up the pleadings, in causes in which issue was joined before, and causes in which issue was joined after, the 1st of November, 1875, see per Lush, J., 1 Charley's Cases (Chambers), 1.

See also *Garling v. Royds*, § *In re a Solicitor*||, *Culley v. Buttifant*, ¶ *In re the Phœnix Bessemer Steel and Iron Company*,** *Lloyd v. Lewis*, †† *The Provident Permanent Building Society v. Greenhill*.‡‡

SECTION 23.—*Rules as to exercise of jurisdiction.*

The jurisdiction by this Act transferred to the said High Court of Justice and the said Court of Appeal respectively shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by such Rules and Orders of Court as may be made pursuant to this Act; and where no special provision is contained in this Act or any such Rules or Orders of Court

* 2 Charley's Cases (Chambers), 1.

† *Ib.*

‡ *The Attorney-General v. Willshire*, 1 Ch. D., 89; 45 L. J. (Ch.), 53; 1 Charley's Cases (Court), 7.

§ 1 Ch. D., 81.

|| 1 Ch. D., 446.

¶ 1 Ch. D., 84.

** 45 L. J. (Ch.), 11; 33 L. T., 403; 24 W. R., 19.

†† 2 Ex. D., 7; 35 L. T., 539; 25 W. R., 102.

‡‡ 1 Ch. D., 624.

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with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective Courts from which such jurisdiction shall have been transferred, or by any of such Courts.

This is one of the transition clauses of this Act.

SECTION 24.—*Law and Equity to be concurrently administered.*

In every civil cause or matter commenced in the High Court of Justice law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively, according to the rules following:—

- (1.) If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a Court of Equity, the said Courts respectively, and every Judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this Act.

- (2.) If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts respectively, and every Judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act.
- (3.) The said Courts respectively, and every Judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any Judge

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thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner ; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any Rule of Court or any order of the Court as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose ; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant.

- (4.) The said Courts respectively, and every Judge thereof, shall recognize and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognised and taken notice of the same in any suit or proceeding duly insti-

tuted therein before the passing of this Act.

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- (5.) No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it, if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay or proceedings in such cause or matter, either generally, or so far as may be necessary for the pur-

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- poses of Justice; and the Court shall thereupon make such order as shall be just.
- (6.) Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and to the other express provisions of this Act, the said Courts respectively, and every judge thereof, shall recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the Common Law or by any custom, or created by any statute, in the same manner as the same would have been recognised and given effect to if this Act had not passed by any of the Courts whose jurisdiction is hereby transferred to the said High Court of Justice.
- (7.) The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, ALL MATTERS SO IN CONTROVERSY

BETWEEN THE SAID PARTIES RESPECTIVELY
MAY BE COMPLETELY AND FINALLY DETER-
MINED, AND ALL MULTIPLICITY OF LEGAL
PROCEEDINGS CONCERNING ANY OF SUCH
MATTERS AVOIDED.

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If the closing words of this section be verified by experience, this Act will prove a second Magna Charta to the suitor. It was the boast of the Court of Chancery that it alone of the Superior Courts was competent “completely and finally to determine *all* matters in controversy between the parties.”

Lord Selborne, C., when introducing the present measure, gave this section a very prominent place in his sketch of its provisions. “I hope the measure which I shall lay on the table will contain what your lordships will consider sufficiently clear and precise directions as to the general way in which the legal and equitable jurisdiction” (of the Supreme Court) “is to be exercised.” He then proceeded to sum up the contents of the present section as follows:—“Those directions are given under seven heads: first, the Court in all its branches will give effect to the equitable rights and remedies of plaintiffs; secondly, it will do the same with respect to equitable defences by defendants; thirdly, it will give effect to counterclaims of defendants; fourthly, it will take notice of all equitable rights and liabilities of any persons appearing incidentally in the course of any proceedings; fifthly, it will stay proceedings, when necessary, by the authority of the Judges before whom an action is pending, and not by injunctions obtained from other Judges; sixthly, it will give effect, subject to all equities, to legal rights and remedies; and, lastly, it will deal, as far as possible, with all questions in controversy in one and the same suit, so as to do complete justice between the parties, and prevent a multiplicity of proceedings.”*

Subsection (1) introduces an entirely new principle into

* *Hansard's Parliamentary Debates*, 3rd Series, vol. 214, pp. 338, 393.

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actions in the Queen's Bench, Common Pleas, and Exchequer. Taken literally, indeed, the words would seem to imply that suits in Chancery would be properly cognisable henceforth in these Courts, or rather Divisions of the Supreme Court. A glance, however, at section 34, *infra*, will dispel this illusion. Subsection (1) taken in connection with section 34, can only mean that if, in the course of an action in the Common Law Divisions of the High Court, *relative to matters within their exclusive jurisdiction*, any equitable claim is advanced by the plaintiff, the Common Law Divisions shall afford the same relief with regard to that particular claim, as the Court of Chancery would have afforded "in a suit for a like purpose."

Where, in an action for "goods sold and delivered," brought before the 1st of November, 1875, against a lady, the defendant pleaded coverture, and the plaintiff desired to turn the action into a suit against her separate estate, and deliver an equitable replication, Quair, J., refused to send the case over to the Chancery Division, and gave leave, instead, to the plaintiff to turn his declaration into a statement of claim.*

Subsection (2) of this section extends the principle already introduced by the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 83, on the recommendation of the Royal Commission on Procedure at Common Law.† The Courts of Law, however, unfortunately held that a plea was inadmissible as an equitable plea at law, unless it was such as would have been a *complete answer* in Equity to the plaintiff's claim, and have justified a Court of Equity in granting a perpetual injunction, absolutely and without conditions.‡ A more liberal view of an "equitable plea" was, however, taken in the recent case of *Allen v. Walker*, L. R., 5 Ex., 187, 191.

A, a solicitor, who had from time to time advanced money to two of his clients, B and C, to enable them

* *Hancock and others v. De Niceville*, 1 Charley's Cases (Chambers), 5.

† As to this enactment, see the notes in the 13th Edition of Roscoe's *Nisi Prius*, pp. 328—334, and the cases there cited.

‡ *Mines Royal Co. v. Magnay*, 10 Ex., 489; *Hyde v. Graham*, 1 H. & C., 598; *Wood v. Copper Mines Co.*, 17 C. B., 561; *Wake v. Hamp*, 6 H. & N., 770.

to carry on building transactions, submitted accounts to them, which were signed by them. A then took a mortgage from them to secure the money already due to him (including untaxed bills of costs) and further advances. The mortgage deed provided that A might, immediately after the execution of the mortgage, enter into possession of the property and let and manage it as he might think fit, and should retain a large commission on the gross receipts as a remuneration, and that if the rents and profits should be insufficient for the payments, A might apply the same in payment of the interest upon the principal, and should pay the costs, &c., out of his own moneys, and the amount so paid should become part of the principal intended to be thereby secured. A declined to make any further advances unless B and C executed the mortgage deed, which they accordingly did. A instituted a suit for foreclosure. B and C by their answers claimed to have the accounts opened, to have the bills of costs included in the security taxed, and that the plaintiff should be disallowed the sums charged as commission. The suit was in issue before the 1st of November, 1875. Held, that the Court under the present subsection and subsection (3), had power to entertain the equitable defence raised by the answers, in the same manner as it might have done if a cross bill had been filed under the old practice, or a counterclaim under the new practice.*

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Where, in an action for rent due under a lease of coal mines, in the Common Pleas Division of the High Court, it was shewn that the plaintiff had no title to part of the mines, and that he knew that he had none when he granted the lease, but that the defendants did not know it and had no means of knowing it, it was held that the deed was to be considered, on demurrer by the plaintiff to the defendants' statement of defence and counterclaim, to have been already rectified; that the statement of defence and counterclaim was good, as it disclosed facts which would have justified the Court of Chancery in so rectifying the lease; and that the defendants were

* *Eyre v. Hughes*, 2 Ch. D., 148; 45 L. J. (Ch.), 395; 2 Charley's Cases (Court), 33.

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entitled to claim damages for the loss which they had sustained by reason of the plaintiff's want of title.*

In an action against the owner of a tug by a ship-owner for "improper navigation," the defendant is entitled to plead section 54 of the Merchant Shipping Act, 1862, limiting his liability to £8 per ton of the tug's tonnage, by way of equitable defence, *pro tanto*, to the action.†

A mortgagor may plead, as a defence to consolidated actions of debt and of ejectment by the mortgagee, his equitable right to redeem; but he must bring the mortgage debt and interest into Court.‡

See also, on the present subsection, *Newell v. The National Provincial Bank of England*,§ and *Fowler v. Andrews*.||

Subsection (3). This subsection gives effect to legal and equitable *counterclaims* of the defendant. It also introduces an important feature in the new system of procedure—the power of bringing *third parties* into the action after it has been commenced, and making them co-defendants.

It is not necessary for a defendant to give formal notice to a co-defendant of a claim against him; it is sufficient to deliver it to him. *Secus*, if the defendant's claim is against a third party.¶

A counterclaim cannot be set up against a third party.**

The object of giving notice to a third party is only to bind the third party by what is decided between the plaintiff and defendant.††

See *Fowler v. Knoop and the London Banking Association*.‡‡

* *Mostyn, Baronet, v. The West Mostyn Coal and Iron Company, Limited*, 1 C. P. D., 145; 45 L. J. (C.P.), 401; 2 Charley's Cases (Court), 43.

† *Wahlberg v. Young*, 24 W. R., 847; 2 Charley's Cases (Court), 54.

‡ *Hanbury v. Noon*, 1 Charley's Cases (Chambers), 6.

§ 1 C. P. D., 496; 45 L. J. (C.P.), 285.

|| *Times*, March 2nd, 1877.

¶ *Shephard v. Beane*, 2 Ch. D., 223; 45 L. J. (Ch.), 429; 2 Charley's Cases (Court), 58.

** *Warner v. Twining*, 24 W. R., 536; 2 Charley's Cases (Court), 59.

†† *Re Craven v. Bray*, 10 N. C., 189; 1 Charley's Cases (Court), 11.

‡‡ W. N., 1877, p. 68; 36 L. T., 219.

See further, as to third parties, Order XVI., Rules 17, 18, 19, 20, and 21, *infra*; and as to counterclaims, Order XIX., Rule 3, *infra*, where numerous other cases will be found.

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Subsection (4) requires the Judges of the various Divisions of the High Court to take *judicial notice* of equitable interests and liabilities, in the same manner as the Court of Chancery would have done, *irrespective of any claim* made by the plaintiff or defendant.

Where the Court of Chancery would relieve a lessee against forfeiture for breach of a covenant to repair, any Division of the High Court will grant the same relief in an action against the lessee in that Division, founded on the breach of covenant to repair. The Court of Chancery would relieve where the landlord has by his conduct misled the lessee into believing that the landlord would not take advantage of the breach.*

Subsection (5). "No cause or proceeding at any time pending in the High Court of Justice, or in the High Court of Appeal, shall be restrained by prohibition or injunction." Lord Coke, in a case in 3 Bulstr. 120, *Warner v. Suckerman*, lays it down as law that the Court of Queen's Bench may prohibit, not only all Inferior Courts, but also the other Superior Courts; but this doctrine has since been very much controverted, and it has been expressly decided† that a prohibition will not lie to the Court of Chancery. Prohibition would, however, until the present enactment, have lain to the Court of Admiralty. It will now no longer lie. It will, however, continue to lie to the Ecclesiastical Courts, which are entirely *dehors* the scope of the Supreme Court of Judicature Acts, 1873 and 1875, and will also continue to lie to every Inferior Court in the Kingdom.‡

A writ of injunction by which proceedings at law are restrained is not in the nature of a prohibition. In issuing injunctions Courts of Equity have claimed no supremacy over the

* *Hughes v. The Metropolitan Railway Company*, 1 C.P. D., 120, 131; 45 L. J. (C. P.), 578, 582; 2 Charley's Cases (Court), 60.

† Comyn's Digest, tit. Prohibition (A).

‡ On the subject of Prohibitions, see Mr. Morgan Lloyd's Treatise on the Law of Prohibition, 1849.

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ordinary tribunals. An injunction is addressed *in personam* and is not directed to the Court. A defendant at Common Law has often some equitable defence which a Court of Law cannot take cognizance of, either from want of jurisdiction or the infirmity of legal process. As it would be against conscience and good faith that the plaintiff at Common Law should use the advantage of which he is thus possessed at law, a Court of Equity restrained by injunction an action at law where the right sought to be enforced was subservient to an equitable claim that the defendant at Common Law could not set up there. The Court interfered on the principle of preventing a legal right from being enforced in an inequitable manner, and of ensuring that the real question and the whole matter in dispute between the parties might be determined.* Injunctions to stay proceedings at law might be perpetual or temporary, total or partial, qualified or conditional, and they might be granted at any state of the proceedings. Thus an injunction was sometimes granted to stay trial; sometimes after verdict to stay judgment; sometimes after judgment to stay execution; sometimes after execution to stay the money in the hands of the sheriff, or the delivery of possession. There was almost an infinite variety of occasions on which injunctions might issue to stay legal proceedings. In general it may be stated that an injunction would issue in all cases where, through accident, fraud, mistake, misrepresentation, inequality of footing between the parties, undue influence, complicated accounts, the existence of an equitable set off, liability to penalties and forfeitures, or equitable assignments, it would have been against conscience to proceed in a Court of Common Law.†

The powers given to Courts of Common Law by the Common Law Procedure Act, 1854, 17 and 18 Vict. c. 125, s. 83, to entertain defences by plea upon equitable grounds, did not interfere with the jurisdiction of the Court of Chancery to restrain by injunction actions at law. The powers given by that Act were permissive only, and did not deprive the defendant at law of the right he had before

* See Kerr on Injunctions in Equity, pp. 13, 14.

† See Story's Commentaries on Equity Jurisprudence, §§ 878-889.

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the passing of that Act of going to a Court of Equity and taking the benefit of a defence which he could not avail himself of at common law. Although the defendant might have an equitable defence at law, he was not bound to plead it.*

By the present subsection the clumsy battery from which Courts of Equity were wont to keep up a raking fire upon plaintiffs at Common Law is dismantled, and its *débris* are carted away. "No cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto." The editors of the 13th edition (1875) of Roscoe's *Nisi Prius*, say with truth, in a foot note,† that "the Supreme Court of Judicature Act, 1873, section 24, much extends the power to set up equitable defences." The present subsection however, contains at the end an important proviso, enabling any person to apply by motion, in a summary way, for a stay of proceedings, and empowering the new Courts to direct it.

As to the principles upon which one branch of the Court will stay its proceedings, on the ground of proceedings commenced in another branch of the Court, reference may be made to *Martin v. Powning* (L. R., 4 Ch., 356), where the Court of Chancery refused (even before the recent Bankruptcy Act, 32 & 33 Vict. c. 71, s. 72) to interfere with the administration of a deed registered under the Act of 1861; also to *Morley v. White* (L. R., 8 Ch., 214), where a deceased person's estate, which was being administered in Chancery, having also fallen into the hands of a trustee in bankruptcy, the deceased person having been a partner, and having both joint and separate liabilities, it was held that proceedings must be taken in Bankruptcy before the administration in Chancery could go on; and Lord Justice James said (p. 218): "It is true that there may be important questions to be determined before it can be ascer-

* *Gompertz v. Pooley*, 4 Drew., 448; *Walker v. Mecklethwaite*, 1 Dr. & Sm., 54; *Davies v. Stainbank*, 6 D. M. and G., 696; *Kingsford v. Swinford*, 28 L. J. (Ch.), 413.

† Page 394.

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tained how the distribution is to be made; but the Court of Bankruptcy is armed for that purpose with every power of a Court of Law and a Court of Equity, and there is not a single question stated to us, as an important and difficult question arising in this matter, which cannot be litigated and determined by that Court of Bankruptcy which the legislature has thought to be the proper tribunal for the determination of it; and those questions, if decided in Bankruptcy, would come on appeal before the same Court as if they had been determined in Chancery, that is, before the same judges sitting under one name instead of under another. Under these circumstances, I am of opinion that the proper forum to determine every one of these questions is the Court of Bankruptcy."

If an interpleader suit (the object of which is to prevent the holder of money claimed by two persons from being vexed by two suits) is instituted in one branch of the Court, another branch will stay proceedings in respect of the same matter. *Prudential Assurance Company v. Thomas* (L. R., 3 Ch., 75) is a good example of an interpleader suit.*

As to the present subsection, reference should be made to Order LI., Rule 2A (Rules of the Supreme Court, June, 1876, Rule 18), *infra*.

Shortly after the commencement of the Supreme Court of Judicature Acts a singular conflict arose between the Common Pleas and the Master of the Rolls with regard to the power of the Master of the Rolls to restrain actions against Companies brought in the Common Pleas, while petitions for winding up these Companies were pending before the Master of the Rolls. An application having been made to the Common Pleas for an order to stay proceedings in an action of ejectment brought prior to the commencement of the new Acts in the Common Pleas Division against the People's Garden Company, a petition to wind up which had been presented subsequently to the commencement of the Acts to the Master of the Rolls, the Common Pleas unanimously refused to hear it,† on the ground that the application ought to have been made to

* Chute on Equity under the Judicature Act, pp. 160, 161.

† *Kingchurch v. The People's Garden Company, Limited*, 1 C. P. D., 45; 45 L. J. (C. P.), 131; 33 L. T., 381; 24 W. R., 41; 1 Charley's Cases (Court), 13.

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the Master of the Rolls, Mr. Justice Archibald remarking that "section 85 of the Companies Act, 1862, was still in force, and was not inconsistent with the present subsection." The Court, however, were unanimously of opinion that the present subsection gave them the power to stay the action *if they chose*. The Master of the Rolls held that the application had been properly made to the Common Pleas Division, and in order to mark his sense of this, he allowed the costs of the application to the Common Pleas as costs in the winding up.* The Master of the Rolls seems to have thought that he had no jurisdiction to entertain an application to restrain any action in another Division, whether a winding-up petition was pending before him with regard to a defendant Company or not. In the case of *Garbutt v. Fawcus*, a few days later, Vice-Chancellor Malins said that "if the application which had been made to the Master of the Rolls, in *Kingchurch v. The People's Garden Company*, had been made to him, he would have granted it." In *Garbutt v. Fawcus*, an action on a promissory note was commenced in the Court of Queen's Bench, before the Supreme Court of Judicature Acts came into operation. After the Acts came into operation the defendant issued a writ in the Chancery Division, claiming specific performance of a parol agreement, for value, not to sue; and moved Vice-Chancellor Malins to direct a stay of proceedings in the action in the Queen's Bench. The motion was dismissed by Vice-Chancellor Malins with costs, on the ground that he had no jurisdiction to restrain the action.† This decision may appear to clash with the observation of Vice-Chancellor Malins already cited, but the Vice-Chancellor drew a broad distinction between *Kingchurch v. The People's Garden Company*, and *Garbutt v. Fawcus*. In *Kingchurch v. The People's Garden Company*, a petition for winding up the defendant Company was pending in the Chancery Division at the same time with the action in the Common Pleas. In *Garbutt v. Fawcus*, no petition for winding up had been presented. The jurisdiction of the Chancery

* In *Re The People's Garden Company, Limited*, 1 Ch. D., 44; 45 L. J. (Ch.), 49; 24 W.R., 40; 1 Charley's Cases (Court), 19.

† *Garbutt v. Fawcus*, 45 L. J. (Ch.), 130; 24 W. R., 91; 1 Charley's Cases (Court), 21.

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2 Division to stay actions against companies in the other Divisions, where a petition to wind up the companies has been presented in the Chancery Division, was not, in the Vice-Chancellor's opinion, taken away by the Supreme Court of Judicature Acts.

The decision of Vice-Chancellor Malins, in *Garbutt v. Fawcus*, was unanimously affirmed by the full Court of Appeal,* but, it would seem, only on the ground that all jurisdiction to stay actions in the other Divisions had been taken away from the Chancery Division by the present subsection.

Shortly after the decision of the Common Pleas in *Kingchurch v. The People's Garden Company*, the Queen's Bench Division came to a directly opposite conclusion in *Walker v. The Banagher Distillery Company, Limited*. After the passing, but before the confirmation of a resolution for the voluntary winding up of that Company, the plaintiff sued the Company, prior to the commencement of the Supreme Court of Judicature Acts, in the Court of Queen's Bench for money paid. The Queen's Bench Division stayed proceedings in the action, but ordered that the costs of the plaintiff in the action should be added to the debt due to him by the Company.†

A winding-up resolution having been passed in *Needham v. The Rivers Protection and Manure Company*, Vice-Chancellor Malins granted an injunction to restrain an action against the Company in the Common Pleas, and laid down the general principle that "in all cases of winding up he would act as if the Supreme Court of Judicature Acts had not passed."‡ The decision of the Queen's Bench in *Walker v. The Banagher Distillery Company* having been cited by the Counsel for the plaintiff in the Common Pleas action against the Company, the Vice-Chancellor made the important statement that "the Common Pleas Division might, and, indeed, ought to have made an order staying

* *Garbutt v. Fawcus*, 1 Ch. D., 155; 45 L. J. (Ch.), 183; 33 L. T., 617; 24 W. R., 89; 1 Charley's Cases (Court), 24.

† *Walker v. The Banagher Distillery Company, Limited*, 1 Q. B. D., 129; 45 L. J. (Q.B.), 134; 33 L. T., 502; 1 Charley's Cases (Court), 31.

‡ *Needham v. The Rivers Protection and Manure Company*, 1 Ch. D. 253; 45 L. J. (Ch.), 132; 33 L. T., 403; 24 W. R., 317; 2 Charley's Cases (Court), 64.

the action, if it had been applied to;" thus reconciling his decision with that of the Queen's Bench Division in *Walker v. The Banagher Distillery Company*, and admitting the competency of the Division in which the action was pending to stay it, independently of the Chancery Division.

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The next case was *In Re The Stapleford Colliery Company, Limited*,* in which Vice-Chancellor Bacon followed the precedents set him by Vice-Chancellor Malins. An action was brought in the Exchequer after the commencement of the new Acts against the Company, a petition for winding up which had been presented to Vice-Chancellor Bacon before the commencement of the new Acts. Final judgment was signed in the action, execution levied, and the sheriff was in possession. Vice-Chancellor Bacon issued an order restraining the execution and the sheriff. "The Companies Act, 1862, s. 83, was," he said, "in full force, notwithstanding the passing of the Judicature Acts."

The case of *In Re The Morriston Patent Fuel and Brick Company, Limited*, is still more recent.† In it Jessel, M.R., directed the application to be made to the Common Pleas Division, in which the action was pending; stating that the Judges of that Division had *reconsidered* their decision in *Kingchurch v. The People's Garden Company, Limited*.

Although the Chancery Division cannot (except, perhaps, where a winding-up petition is pending before it), restrain an action in another Division, it can enforce an undertaking in the Chancery Division by the plaintiff in the action, that the judgment, when signed, shall be dealt with as the Chancery Division may direct.‡

In *Edwardes v. Noble*, a suit in the Chancery Division for the rescission of a contract for the purchase of land, and for an injunction to stay an action for damages, for breach of the contract, commenced by the defendant against the plaintiff, in the Exchequer Division, was ordered by Vice-Chancellor Bacon to stand over until after the trial in the Exchequer Division.§ The Vice-Chancellor, however, intimated his willingness to try the

* *In Re The Stapleford Colliery Company, Limited*, 24 W. R., 173; W. N., 1875, p. 256; 1 Charley's Cases (Court), 32. † 12 N. C., 21.

‡ *Fletcher v. Wood*, W. N., 1876, p. 16; 2 Charley's Cases (Court), 65.

§ *Edwardes v. Noble*, 24 W. R., 390; 2 Charley's Cases (Court), 71.

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action, in case it were transferred to the Chancery Division; and a Judge of the Exchequer Division (Huddleston, B.), having refused to order the action there to be transferred from that Division to the Chancery Division for trial before the Vice-Chancellor with the Chancery suit, the Queen's Bench Division made the order.*

The Queen's Bench Division refused to stay a creditor's action in that Division pending an administration suit in the Chancery Division; but agreed to stay the creditor's action at the end of a week, if the decree in the administration action should meanwhile have been obtained.†

Actions against tenants subsidiary to an action of ejectment were stayed by Lush, J., at chambers, on an *ex parte* application by the defendant, by analogy to the Chancery practice.‡

An action in detinue for bonds, part of the estate, brought by the executor, was stayed by Quain, J., at chambers, on account of a suit for the administration of the estate having been commenced by the defendants in the Chancery Division.§

An action against a company was stayed by Quain, J., at chambers, at the instance of the official liquidator, where the defendant company had gone into voluntary liquidation.¶

Proceedings were stayed by Lindley, J., at chambers, in an action on two solicitors' bills of costs, commenced before the 1st of November, 1875, on the defendant agreeing to withdraw all his defence, except as to the costs being taxed, and paying the plaintiff's costs of action subsequent to the writ, and the cost of the application.¶¶

The proceedings were stayed by Archibald, J., at chambers, in an action, on payment into court of the amount claimed, the defendant having brought a Chancery suit against the plaintiff for an account.**

* *Edwards v. Noble*, *Times*, Monday, March 27th, 1876; 2 Charley's Cases (Court), 72.

† *Harman v. Harman*, *Times*, Monday, March 27th, 1876; 2 Charley's Cases (Court), 74.

‡ *Blowitt v. Dowling*, 1 Charley's Cases (Chambers), 7.

§ *Geoghegan v. Domer*, 1 Charley's Cases (Chambers), 8.

¶ *Moore v. The City and County Bank*, 1 Charley's Cases (Chambers), 10; *Owens v. The Steam Coal Company*, 1 Charley's Cases (Chambers), 11, S.P.

¶¶ 2 Charley's Cases (Chambers), 3.

** *Kevers v. Michell*, 2 Charley's Cases (Chambers), 4.

An application for a stay of proceedings in an action of trover against executors for goods sold by them under an order of the Court, while an administration suit was pending, was refused by Quain, J.*

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An action will not be stayed in order to enable the defendant to found a counterclaim on the possible future dishonouring of a bill given by the plaintiff (per Quain, J., at chambers).†

As to staying proceedings in a Common Law action in order to refer for taxation of costs in suit, see per Lush, J., 1 Charley's Cases (Chambers), 6.

Vice-Chancellor Malins has expressed his dissatisfaction with the system of granting injunctions at chambers when the Courts are sitting. By analogy to the former Chancery practice, the Judges of the new tribunals ought not, he considered, to grant injunctions at chambers when the Courts were sitting.‡

It has been decided that the jurisdiction of the Court of Bankruptcy to restrain actions against trustees in bankruptcy is unaffected by the present subsection.§ But see, per Malins, V.C., in *Jenney v. Bell*.||

See, further, as to this subsection, *Dawkins v. Prince Edward of Saxe-Weimar*.¶

Subsection (6) binds the judges to take judicial notice of legal, customary, and statutory rights, claims and liabilities, but only "subject to the aforesaid provisions for giving effect to equitable rights and other matters in equity." The full meaning of the subordinate position in which the Common Law is placed by the section can only be apprehended by referring to subsection (11) of section 25—"The Rules of Equity shall prevail." This, no doubt, is the dominating idea, not merely of this section, but of the whole Act.**

* *Wood v. Wakefield*, 1 Charley's Cases (Chambers), 9.

† *Frakes v. Breslon*, 1 Charley's Cases (Chambers), 9.

‡ *English v. the Vestry of Camberwell*, W. N., 1875, p. 256; 1 Charley's Cases (Court), 34.

§ *Ex Parte Ditton, In Re Woods*, Ch. D., 557; 45 L. J. (Bankruptcy), 87; 34 L. T., 109; 24 W.R., 289; 2 Charley's Cases (Court), 66. See, further, as to subsection (6), *Hodgson v. Forster*, 12 N. C., 64.

|| 2 Ch. D., 547. ¶ 1 Q.B. D., 499; 45 L.J. (Q.B.), 567; 24 W.R., 670.

** The marginal note to this section runs, "Law and Equity to be concurrently administered." To fill out its full meaning, however, it is necessary to add, "Provided always, that Law follows Equity, whenever they don't concur."

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Subsection (7). See the remarks on this subsection, *supra*, p. 43. "I consider this," said Kelly, C.B., "to be one of the most salutary enactments in the Judicature Acts."*

Where, pending proceedings in the Probate Division to determine the validity of a will, an action was commenced in the Chancery Division for the appointment of a receiver over the testator's realty, the Master of the Rolls transferred the action in the Chancery Division to the Probate Division, to avoid multiplicity of suits.†

N.B. The student who is desirous of obtaining a comprehensive view of the effect of this section and section 25 upon the systems of legal and equitable jurisprudence will do well to procure "Equity under the Judicature Act," by Mr. Challoner W. Chute,‡ Lecturer to the Incorporated Law Society.

SECTION 25.—*Rules of Law upon certain points.*

And whereas it is expedient to take occasion of the union of the several Courts whose jurisdiction is hereby transferred to the said High Court of Justice to amend and declare the law to be hereafter administered in England as to the matters next hereinafter mentioned: Be it enacted as follows:—

Administration of Assets of Insolvent Estates.

- (1.) *In the administration by the Court of the assets of any person who may die after the passing of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable,*

* In *The Manchester Sheffield and Lincolnshire Railway Company and The London and North Western Railway Company v. Brooks*, 25 W. R., 413; 2 Ex. D., 243; 46 L. J. (Ex.), 244; 36 L. T., 163.

† *Barr v. Barr*, W. N., 1876, p. 44; 2 Charley's Cases (Court), 76.

‡ London: Butterworths, 7, Fleet Street, 1874.

and as to the valuation of annuities and future or contingent liabilities, respectively, as may be in force for the time being under the law of Bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person may come in under the decree or order for the administration of such estate and make such claims against the same as they may respectively be entitled to by virtue of this Act.

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Statutes of Limitation inapplicable to Express Trusts.

- (2.) No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations.

Equitable Wastes.

- (3.) An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.

Merger.

- (4.) There shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

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Suits for Possession of Land by Mortgagors.

- (5.) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipts of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

Assignment of Debts and Choses in Action.

- (6.) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or

chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the Relief of Trustees.

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Stipulations not of the Essence of Contracts.

- (7.) Stipulations in contracts, as to time or otherwise, which would not before the *passing* of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity.

Injunctions and Receivers.

- (8.) A mandamus or an injunction may be

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granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient that such Order should be made ; and any such Order may be made either unconditionally or upon such terms and conditions as the Court shall think just ; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim or title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title ; and whether the estates claimed by both or by either of the parties are legal or equitable.

Damages by Collisions at Sea.

- (9.) In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail.

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- (10.) In questions relating to the custody and education of infants the Rules of Equity shall prevail.

Cases of conflict not enumerated.

- (11.) Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of Equity and the rules of the Common Law with reference to the same matter, **THE RULES OF EQUITY SHALL PREVAIL.**

Subsection (1) of this section was repealed in Committee on the Amending Act, on the motion of Mr. (now Sir Henry) Jackson, Q.C., and the following subsection (which now forms subsection (1) of section 10 of that Act) was substituted for it:—"In the administration by the Court of the assets of any person who may die after the [commencement] of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, [and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities, and the costs of winding up,] the same rules shall prevail and be observed, as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, under the law of Bankruptcy, with respect to persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, [or out of the assets of any such company], may come in under the decree or order for the administration of such estate, [or under the winding up of

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such company,] and make such claims against the same as they may respectively be entitled to by virtue of this Act.”*

It will be seen that the effect of this Amendment is to destroy the rule in *Kellock's Case*,† as laid down by the Lords Justices of Appeal in Chancery‡:—“When a company is being wound up under the Companies Act, 1862, a creditor holding security is entitled to prove for the whole amount that is due to him, and not merely, as in bankruptcy, for the balance remaining due after realising or valuing his security.” Henceforth the rules in Bankruptcy “as to the respective rights of secured and unsecured creditors, and other debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively” will be made applicable “in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient,” just as in this subsection, as originally passed in 1873, these rules were made applicable, “in the administration by the Court of the assets of any person, whose estate may prove to be insufficient.”

See, further, the note to s. 10 of the Amending Act, *infra*, and the cases there cited.

The learning upon the subject-matter of subsection (2) will be found fully explained in Darby and Bosanquet on the Statutes of Limitation, Part IV., Chapter II., and Part V., Chapter XIX.; Brown on the Law of Limitation, pp. 288-301, and 496-501; Charley on the Real Property Acts, 1874, 1875, and 1876 (3rd edition), pp. 57-63; Dart's Vendors and Purchasers, 351, 352 (4th edition.)§

The law is thus briefly stated in Spence on the Equitable Jurisdiction||:—“As between the *cestui que trust* and trustee, unless the trustee be such by implication or construction of law only, the Statute of Limitations does not apply; the trustee can only discharge himself by accounting to his

* The words added to the section by Sir Henry Jackson are enclosed in brackets.

† 3 L.R. (Ch. App.), 769. June, 1868.

‡ Lord Hatherley and Sir C. J. Selwyn.

§ See *Obee v. Bishop*, 1 D. F. and J., 137; *Burdick v. Garrick*, 5 L. R. (Ch. App.), 233.

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estis que trust[ent] in such manner as the Court shall consider that he ought to have done.”

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The learning upon the subject-matter of subsection (3) will be found fully explained in the notes to the case of *Gerth v. Cotton*, in White and Tudor's Leading Cases in Equity, Waste, pp. 697-767 (4th Edition); and Yool's Essay on Waste, &c., Chapter I.*

Lord Selborne, C., when introducing the present measure, thus summarised this subsection:—

“The distinction between legal and equitable waste is to be done away with.”†

The learning on this subject is thus summarised in Spence on the Equitable Jurisdiction ‡:—

“A tenant for life without impeachment of waste, will be restrained, though having a legal right so to do, from what has been termed malicious, extravagant or humorsome waste, for instance, the total destruction of a wood or coppice. So he will be restrained from cutting down trees planted or left standing for ornament, whether really or fancifully ornamental, but not merely because they may be really ornamental; and the protection extends not only to trees about the mansion, but to those in rides and avenues, and to trees or clumps of trees wheresoever growing and though at a considerable distance, if planted and intended for ornament, and though planted by himself. It makes no difference that the original mansion house is pulled down, another may possibly be built for the sake of the trees.” It is immaterial that “the inheritance may have been actually improved” by the equitable waste.§

A tenant in tail after possibility of issue extinct, although unimpeachable of waste, is within the principle of equitable waste. And so, also, is a tenant in fee with an executory devise over.

The learning on the subject-matter of the 4th subsection will be found carefully explained in Vol. III. of Preston's

* See *Vane v. Lord Barnard*, 2 Vern., 738; *Marquis of Downshire v. Lady Sandys*, 6 Vesey, 107.

† Hansard's Parliamentary Debates, 3rd Series, vol. 214, page 360.

‡ Vol. 2, pages 571, 572.

§ *Lewis Bowles's Case*, 11 Co., 79; *Williams v. Williams*, 15 Ves., 428; 12 East, 209; *Attorney-General v. Duke of Marlborough*, 3 Madd., 538; *Abraham v. Bubb*, 2 Show., 69; 2 Freem., 52; *Anon.*, 2 Freem., 278; *Cook v. Whalley*, 1 Eq. Ca. Abr., 400.

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Treatise on Conveyancing; Mayhew on the Law of Merger,* and Spence on the Equitable Jurisdiction. The inexorable application of the doctrine of merger at the Common Law may be illustrated by the case of *Stephens v. Bridges*,† decided by Sir John Leach, V.C., in 1821. There a term was created in 1720 for 1,000 years. Another term for 500 years was created in 1725. The persons possessed of the term for 1,000 years took an assignment of the term of 500 years and assigned both these terms to certain trustees for sale. The trustees put up the term for 1,000 years for sale, as "an absolute irredeemable term of 1,000 years." On an objection to the title taken by a purchaser, the Vice-Chancellor of England decided that the trustees having united in them the term of 1,000 years, and the right to the reversionary term of 500 years the term of 1,000 years was merged in, or swallowed up by, the reversionary term for 500 years, and the trustees had, therefore, no term of 1,000 years to sell! He declined to say what view a Court of Equity might take of the matter under the circumstances, as he was only called upon to decide whether the vendor of the term of 1,000 years could make a good title in law. It seems strange that a term of 1,000 years should merge in a term of 500 years, but such is the law of the land. Mr. Spence observes:—"The principle of law is that a term merges by union with the inheritance,‡ whether the interest in the reversion be absolute, or only for a limited period: but upon this subject the Court of Chancery is not guided by the rules of law."§ Equity is guided by the intention, actual or presumed, of the person in whom the interests are united.|| Equity will also relieve against the merger of a term in cases of fraud, or in order to do complete justice to the beneficial owner of the term. See as to illustrations of these two points, temp. Car. II., *Danby v. Danby*,¶ *Saunders v. Bournford*.** The doctrine of Equity that the intention of the person in whom the interests

* See *Nurse v. Ferworth*, 3 Swanst., 608.

† Madd. and Geld., 66. Also see *Hughes v. Robotham*, Cro. Eliz., 302.

‡ It should be "the reversion." See the judgment of Leach, V.C., *ubi supra*.

§ *Forbes v. Moffat*, 18 Ves., 390.

|| Per Sir William Grant, M.R., in *Forbes v. Moffat*, *ubi supra*.

¶ Finch Rep., 220.

** Finch Rep., 424.

are united is to be regarded is forcibly illustrated by the cases relative to the payment off of charges by the tenant in possession. Where debtor and creditor become the same person there is in law an immediate merger or extinguishment of the debt.* Equity holds that where a tenant in fee or a tenant in tail in possession pays off a charge upon his estate, the charge is merged in the estate, unless he unequivocally shows his intention that it shall not be merged. On the other hand, if a tenant for life pays off a charge upon the estate out of his own money, the burden of proof is upon those who allege that, in paying off the charge, he intended to exonerate the estate. A tenant in tail without power of alienation† and a tenant in fee with an executory devise over‡ stand, in this respect, on the same footing as a tenant for life.

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Parol evidence will be admissible to show the object which the tenant for life had in view in paying off the charge.§

If a trust estate merge at law in a beneficial one, equity will not allow the merger to destroy the trust, or prejudice the rights of the *cestui que trust*,|| but will decree possession of the lands, for the time that the estate is merged, to the beneficial owner as against the trustee and all persons claiming under him, or will decree a conveyance, as the circumstances of the case may require.¶

The learning upon the subject-matter of subsection (5) will be found in Coote upon Mortgages; Fisher on Mortgages; Miller on Mortgages; White and Tudor's Leading Cases, Notes to *Thornborough v. Baker*; and Spence on the Equitable Jurisdiction.

The position at the Common Law of a mortgagor left in possession of the mortgaged premises by the mortgagee, is thus described by Mr. Spence:—"He only holds them by the will or permission of the mortgagee, who may,

* Per Lord Loughborough, in *Lord Compton v. Oxenden*, 2 Ves. Jun., 263.

† *Shrewsbury v. Shrewsbury*, 1 Ves. Jun., 227.

‡ *Drinkwater v. Coombe*, 2 Sim. and St., 340.

§ *Astley v. Miller*, 1 Sim., 298; *Burrell v. Earl of Egremont*, 7 Beav., 232.

¶ *Hopkins v. Hopkins*, 1 Atk., 592; *Lee's Case*, 3 Leo., 110.

¶ *San Nuro v. Yercorth*, 3 Swanst., 608.

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by ejectment and without notice, recover the possession against him or against his tenant under a tenancy created subsequently to the mortgage, and he is not even entitled to reap the crop, in which respect the mortgagor is in a worse condition, as regards his possession, than a tenant at will." In equity, however, "the mortgagee who suffers the mortgagor to remain in possession, is not entitled to call on the mortgagor to account for the rents he has received* though the mortgaged property may have become an insufficient security; nor even, as it seems, for rents which have been received by the mortgagor after notice to the tenants to pay their rents to the mortgagee."†

But the more recent work of Mr. Fisher lays down‡ that "the legal mortgagee, who gives notice to the tenant to pay him the rent, becomes entitled to the rent which is due at the date of the notice, as well as to that which accrues afterwards, whether the lease be made before or after the mortgage, for in the one case the lease is void against the mortgagee, and in the other notice of the mortgage to the tenant operates as an attornment by him."

The present subsection gives the mortgagor in possession, up to the time when the mortgagee gives notice of his intention to take possession, power to sue for the rent in his own name, instead of resorting to the roundabout method of suing in the name of the mortgagee. That nice questions might arise as to the authority of the mortgagor to use the name of the mortgagee, may be gathered from the cases of *Trent v. Hunt*,§ and *Snell v. Finch*.¶

As the punctual payment of interest to the mortgagee must largely depend on the punctual receipt of the rent by the mortgagor, it is for the manifest benefit of both parties that the mortgagor should be entitled to sue without delay.

There is a proviso at the end of this subsection: "Unless the cause of action arises upon a lease or other contract made by him jointly with any other person." It is apprehended that this merely means that the mortgagor

* *Turkington v. Kearman*, Llo. and G., 43.

† 2 Spence on the Equitable Jurisdiction, pp. 646, 647.

‡ 2 Fisher on Mortgages, 2nd edition, p. 867.

§ 9 Ex., 14.

¶ 13 C. B. (N.S.), 661.

cannot sue "in his own name only" upon a joint demise or joint contract, his co-lessor or co-contractor must join.

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The learning on the subject-matter of subsection (6) will be found in 2 White and Tudor's Leading Cases, Notes to *Warmatey v. Lady Tanfield*; 2 Spence's Equitable Jurisdiction.

This subsection contains a most salutary change in the law, by importing into it the equitable doctrines respecting the assignment of debts, and other legal choses in action. "The great wisdom and policy of the sages and founders of our law," in pronouncing things in action to be not assignable (so much vaunted by Lord Coke*), was happily treated as "foolishness" by the "sages and founders" of the Equitable Jurisdiction.†

Mr. Chute,‡ in his kindly way, making things pleasant all round, has, however, a good word to say, even for the Common Law doctrine in this case:—

"We can easily perceive that in this particular the Common Law rule, that nothing should be assignable which could not be assigned by actual delivery, was preventive of fraud; thus, in the case of goods, every one could see who was the owner of them by seeing in whose possession they were; and even in the case of lands, though the title-deeds might prove no more than a life tenancy in the holder thereof, still to that extent the possession of the deeds proved ownership; but when Equity, no doubt to the great convenience and advantage of commerce, introduced the principle of allowing choses in action and equitable interests to be assigned in Equity, it is clear that a road was opened for a new kind of fraud. In the case of most choses in action there is no badge of ownership by which it can be known whether there has or has not been a transfer, and thus it is easy to see how the assignment of choses in action and of equitable estates, being abstractions not capable of actual physical possession, as is the case with ownership of personal chattels, and even (through the title-deeds) of real property, opens the way to fraud upon third parties."

* *Lampet's Case*, 10 Co., 47.

† "The Courts of Chancery from the earliest times thought the Common Law doctrine too absurd for us to adopt." Buller, J., in *Master v. Miller*, 4 T. R., 340.

‡ Equity under the Judicature Act, pp. 57, 58.

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It will be perceived that the language of subsection (6) is very guarded. In order that a legal chose in action may become legally assignable, (1) the assignment must be an "absolute" one; (2) it must be "by writing under the hand of the assignor;" (3) it must not "purport to be by way of charge only;" and (4) "express notice in writing" of the assignment must be "given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim the chose in action." Even when all these formalities have been scrupulously observed, the assignee will only take, "subject to all equities which would have been entitled to priority over" his "right, if the Act had not passed;" and he may find himself involved, under the proviso at the end of the subsection, in an interpleader action with "the assignor, or any one claiming under him," or "any other" claimant.

The assignment must be in writing, signed by the assignor, although in equity the assignment might have been by parol.*

The chief advantage which the assignee will derive from the change in the law will be that "all legal remedies" will be, *ipso facto*, transferred to him at the same time with the chose in action, and he will be able to "give a good discharge" for the chose in action to "the person from whom the assignor would have been entitled to claim" it, and this "without the concurrence of the assignor." "Exceptions" have been gradually "eating up the rule," that a chose in action is not assignable at Common Law, but still the old doctrine left its uncomfortable traces in the requirements that the assignee of the chose in action, *e.g.*, of a bond debt, could only sue by power of attorney in the name of the assignor, or original creditor. The legislature has at length acted on the view of Mr. Justice Buller:—"I see no use or convenience in preserving that shadow when the substance is gone." The assignee of a bond debt will now be able to sue in his own name.

The most important ceremony to be performed by the assignee, in order to perfect his title, is to give notice in

* Per Lord Mansfield, C. J., in *Heath v. Hall*, 4 Taunt., 328; 2 Rose, 271.

† *Master v. Miller*, 4 T. R., 341.

writing of the assignment to the debtor, trustee, or other person from whom the assignor would have been entitled to claim the chose in action. The notice must be "express:" "constructive" notice—that blot upon the equitable doctrine of notice—will be insufficient.

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It will be seen that the spirit of the maxim, "He who comes into equity must do equity," has been preserved in this case by the qualifying clause in brackets, "subject to all equities which would have been entitled to priority if this Act had not passed."*

By Order I., Rule 2, of the first Schedule to the Supreme Court of Judicature Act, 1875, "the procedure and practice now used by Courts of Common Law under the Interpleader Acts, 1 and 2 Wm. IV., c. 58, and 23 and 24 Vict. c. 126, shall apply to all actions and all the Divisions of the High Court of Justice."

The Acts for the relief of trustees, referred to in the proviso at the end of this subsection, are the 10 and 11 Vict. c. 96, and 12 and 13 Vict. c. 74.†

Some cases have arisen upon this subsection, to which reference may now be conveniently made.

Mr. Justice Quain, at chambers, inclined to the view that the proviso to this subsection as to interpleading applies, though no action has been commenced. He refused, however, leave to the Company which applied to him to call upon rival claimants to certain shares in it to interplead, on the ground that there was not sufficient notice of an absolute written assignment of the shares.‡

The alternative of paying the money into Court is given by this subsection. Leave was given by Lindley, J., at chambers, to a defendant to pay into Court the amount of a judgment-debt, less his costs to be taxed, notice in

* See, on this subject, the following cases: *Henry Holden's Case*, L. R., 8 Eq., 444, 443; *South Blackpool Hotel Company*, *ib.* 25; *Re Northern Assam Tea Company*, L. R., 10 Eq., 458; *Roger v. Comptoir d'Escompte de Paris*, L. R., 2 P. C., 393, 405; *Re Imperial Land Company of Marseilles, Ex Parte Colborne and Strawbridge*, 42 L. J. (Ch.), 372.

† See also 28 and 29 Vict. c. 99, s. 1; 30 and 31 Vict. c. 142, ss. 24, 25 (s. 3 of 10 and 11 Vict. c. 96, is repealed by 35 and 36 Vict. c. 44, s. 26).

‡ *Re The New Hamburg and Brazilian Railway Company*, 1 Charley's Cases (Chambers), 11.

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writing having been given him of an assignment of the judgment-debt, and of conflicting claims to it.*

In *Schroeder v. The Central Bank of London* the Counsel for the plaintiff maintained that, although in Equity a cheque is not an assignment by the drawer of part of his balance at his bankers to the holder of the cheque,† and the holder of the cheque has, consequently, no cause of action against the bank for refusing to cash it, yet that under the present subsection a cheque was not only an assignment, but “an absolute assignment by writing under the hand of the assignor,” of part of his balance at his bank to the holder of the cheque; that “express notice in writing” was given to “the debtor,”—i.e. to the bank—by the presentation of the cheque at the bank; and that the holder’s cause of action against the bank was complete, as soon as the bank had refused to cash the cheque. The Common Pleas Division, however, scouted this notion, holding that, as a suit in Equity could not have been maintained by the holder of a cheque against a bank for dishonouring it, a cheque being a mere order to pay, and not an equitable assignment of the whole or part (as the case may be) of the drawer’s balance at the bank, the present subsection does not make that a legal assignment which was not an equitable assignment before the Supreme Court of Judicature Acts, came into operation.‡

As to payment out of Court of policy moneys paid in, see *In Re Haydock’s Policy*.§

The learning upon the subject-matter of subsection (7) will be found in Sugden’s Vendors and Purchasers; Dart’s Vendors and Purchasers; and 2 White and Tudor’s Leading Cases in Equity, Notes to *Seton v. Slade*.

“At law,” said Lord Romilly, M.R., in *Parkin v. Thorold*,|| “time is always of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it. This is not the doctrine of a Court of Equity. Courts of Equity make a distinction between that which is

* *Lacy v. Wieland*, 2 Charley’s Cases (Chambers), 4.

† *Hopkinson v. Foster*, L.R., 19 Eq., 74, before the Master of the Rolls.

‡ *Schroeder v. The Central Bank of London*, 34 L. T., 735; 24 W. R., 710; 2 Charley’s Cases (Court), 77. § 1 Ch. D., 611,

|| 16 Beav., 59, 65.

matter of substance and that which is matter of form, and if it finds that by insisting on the form the substance will be defeated, it holds it to be inequitable to insist on such a form, and thereby defeat the substance.”

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Specific performance of contracts is frequently enforced in Equity, where, if time were considered to be of the essence of the contract, the contract must inevitably be regarded as at an end. The delay of a single day, for example, in the delivery of the abstract of title would invalidate the contract for sale of land at law,* though the delay may have been unavoidable. But in Equity, a stipulation for delivery of an abstract on a certain day is considered to have been waived if the purchaser *does not ask for it within a reasonable time* before the day fixed for its delivery.† So an express stipulation that time shall be of the essence of the contract is considered in Equity to have been waived by a purchaser who receives and retains without objection an abstract upon the face of which it appears that a title cannot be made within the time fixed for completion.‡

The principles on which the Court of Chancery acted in reference to the subject-matter of this subsection in cases of specific performance were lucidly explained by Lord Cairns, L.J., in the case of *Tilley v. Thomas*, L. R., 3 Ch., 61, 66.

“Passing.” See s. 10 of the Amending Act, *infra*.

Subsection (8), Order LII., of the first Schedule to the Supreme Court of Judicature Act, 1875, contains an express reference to this subsection:—“An application for an order under section 25, subsection (8), of the [Principal] Act, may be made to the Court or a Judge by any party. If the application be BY THE PLAINTIFF for an order under the said subsection (8), it may be made EITHER *EX PARTE* § OR WITH NOTICE; and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application.” This is Rule 4. Rules 1, 2 and 3 contain valuable provisions

* See *Barry v. Young*, 2 Esp., 640 n.

† *Guest v. Hornby*, 5 Ves., 818, 823; *Jones v. Price*, 3 Aust., 924.

‡ See *Hipsell v. King*, N.S., 1 W. C., 401, 419.

§ An injunction ought not to be granted *ex parte*, except in cases of emergency. An affidavit in support of the *ex parte* application is usually made by the plaintiff. *Coe's Practice of Judges' Chambers*, 134.

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(copied *verbatim* from the Schedule to this Act), relative to “*interim* orders as to the subject-matter of litigation,” “power to make orders for the sale of goods,” and “power for the Court to make *interim* orders as to the preservation or examination of property, examination of witnesses, &c.”

By the Vth Order and 10th Rule of the Rules of the Supreme Court (Costs), in the cases of an *ex parte* application for an injunction, the party making such application is to furnish copies of the affidavits upon which it is granted, upon payment of the proper charges immediately upon the receipt of a written request from the party requiring any copies, or his solicitor, and an undertaking to pay the proper charges within such time as may be specified in such request or as may have been directed by the Court.

Lord Selborne, in his opening remarks, when introducing the present measure, said regarding this subsection:—“It is proposed to remove certain technical impediments now existing in equity, in the way of applications for injunctions and the appointment of receivers”*. No allusion to “*Mandamus*” was made by Lord Selborne.

Section 68 of the Common Law Procedure Act, 1854 enables the plaintiff in any action in any of the Superior Courts, except replevin and ejectment, to claim a writ of mandamus “commanding the defendant to fulfil any —[public or *quasi*-public †]—“duty, in the fulfilment of which the plaintiff is personally interested.” The Court of Queen’s Bench had the sole power to issue the HIGH PREROGATIVE WRIT of Mandamus, and it is presumed that under sect. 34 of this Act this power is vested in the Queen’s Bench Division, to the exclusion of the other Divisions of the High Court.

Under the present subsection a mandamus may be issued by any Division on an interlocutory application, whenever it appears just and convenient.

The jurisdiction of the Court of Chancery to grant injunctions and appoint receivers, the one for the *prevention of wrong*, the other for the *preservation of property*, w

* Hansard’s Parliamentary Debates, New Series, vol. 214, p. 340.

† *Benson v. Paul*, 6 E. & B., 273.

exercised by it, because it was a great hardship in many cases that a plaintiff should be left to the uncertain remedy of damages at the Common Law, which the personal estate of the defendant might, perhaps, not be able to satisfy.*

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Vice-Chancellor Kindersley, in *Loundes v. Bettie*,† made some remarks, which throw considerable light upon this subsection, and upon the allusion of Lord Selborne to "certain technical impediments." "The proper mode," said the Vice-Chancellor, "is to classify the cases under two heads; the one, where the party against whom the application for the injunction is made is in possession; and the other, where the plaintiff is in possession, and is asking the Court to protect his estate." The Vice-Chancellor then proceeded to review the cases in which the defendant, i.e., "the person against whom the injunction" was sought, was "in possession," citing, amongst other things, an observation of the Court in *Talbot v Hope*,‡ that the Court is much more reluctant to entertain a suit against a person in possession, than when he is not in possession. The Vice-Chancellor summed up the result of the cases on this branch of the subject as follows:—"The result of these cases is that where the plaintiff is out of possession, the Court will refuse to interfere by granting an injunction, unless there be fraud or collusion, or unless the acts perpetrated or threatened are so injurious as to tend to the destruction of the estate"§ It appears from the Vice-Chancellor's review of the cases, that Sir William Grant,|| Lord Justice Knight Bruce,¶ and Vice-Chancellor Wigram,** when allowing demurrers to bills praying for injunctions, where the defendant was in possession, expressed surprise and dissatisfaction with the state of the law (or rather, of the "equity").

"The cases," continued Vice-Chancellor Kindersley, in

* Chute on Equity under the Judicature Act, p. 153.

† 33 L. J. (Ch.), 431.

‡ 4 K. and J., 108.

§ See *Lancashire v. Lancashire*, 9 Beav., 120.

|| In *Jones v. Jones*, 3 Mer., 161.

¶ In *Haigh v. Jaggard*, 2 Coll., 231.

** In *Davenport v. Davenport*, 7 Ha., 217.

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Lowndes v. Bettie,* “where the plaintiff is in possession, may be divided into two subordinate heads: first, where the defendant claims under colour of right; and, secondly, where he is an absolute stranger.” After reviewing the cases on these two branches of the second part of the subject, the Vice-Chancellor summed up as follows:—
“When the plaintiff is in possession, and the person doing the acts complained of is an utter stranger not claiming under colour of right, the tendency of the Court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law; though where the acts tend to the destruction of the estate, the Court will grant it. But where the party in possession seeks to restrain one who claims by adverse title, there the tendency will be to grant the injunction.”

The “technical impediments,” referred to by Lord Selborne in the way of applications for the appointment of receivers, are thus stated by Mr. Chute †:—

“The Court will generally provide for the safety of property pending litigation, by ordering the property to be brought into Court, or to be collected by a receiver. But it has generally been held that the Court would not appoint a receiver at the instance of a person claiming by a title which he might enforce by ejectment; such a bill was called an ejectment bill, and would be dismissed, and the plaintiff would be turned over to the Common Law Court. Thus, where there were three persons claiming real property by three independent titles, and one of them asked for a receiver *pendente lite*, it was held, on appeal, that the Court had no jurisdiction to grant one.‡ So, where the plaintiff, entitled to an annuity payable out of leasehold property, came to ask for a receiver of his annuity, it was held that, as he had a power of distress by 4 Geo. II. c. 28, to recover the annuity, the Court would give no relief; but it was said, that if an annuity has been long in arrear, and a distress would not enable the annuitant to raise the amount due, a receiver might be necessary.§

* 33 L. J. (Ch.), 451.

† Equity under the Judicature Act, pp. 163, 164.

‡ *Carrow v. Ferrior*, L. R., 3 Ch., 719.

§ *Kelsey v. Kelsey*, L. R., 17 Eq., 495.

A plaintiff will no more have his suit dismissed for coming to the wrong Court, but a receiver will be granted, if just and convenient, whether the estate claimed be legal or equitable."

Act 1878,
s. 25.

The subsection now under discussion sweeps away, it will be perceived, in its studied and wide-reaching terms, all the petty distinctions, which have been so laboriously built up by the Courts of Chancery, and the new Courts start with much larger powers of granting injunctions than the Court of Chancery had. The latter part of the subsection only applies, it will be seen, to injunctions, although Mr. Chute appears to think that it applies also to receivers.

The Common Law Jurisdiction to grant injunctions is defined by sections 79 and 82 of the Common Law Procedure Act, 1854.* In all cases of breach of contract or other injury, where the party injured was entitled to maintain and had brought an action, he might at any time after commencing it, have applied *ex parte* to the Court or a Judge for a writ of injunction to restrain the defendant in the action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

The powers conferred by the present subsection with respect to the issuing of injunctions have frequently been invoked by suitors in the High Court of Justice.

In the following cases the application for an injunction was successful :—

Lush, J., granted, at chambers, an injunction to restrain paying away money, and this without affidavit, following the Chancery practice.†

An injunction was granted by Quain, J., at chambers, to restrain the defendant from pulling down a house in course of erection for him by the plaintiff, and which the defendant alleged was not built according to contract.‡

* See also 15 & 16 Vict. c. 83, s. 42, as to patent cases; and 25 & 26 Vict. c. 88, s. 21, as to trade marks.

† 1 Charley's Cases (Chambers), 12.

‡ *Drake's Patent Concrete Company v. Dower*, 1 Charley's Cases (Chambers), 13.

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An *ex parte* application at chambers for an injunction to restrain the defendant, in an action of ejectment, from keeping and using a steam engine on the premises, until the trial of the action, was granted by Quain, J., the defendant having covenanted not to do any act dangerous to his co-tenants or to the landlord, and the fire-office, in which the premises were insured pursuant to covenant by the plaintiff, having refused to continue the insurance on account of the engine.*

An *ex parte* application for an *interim* injunction to restrain the defendant from negotiating a bill of exchange, indorsed, and put into his hands to discount, and which was the subject-matter of the action, was granted by Lindley, J., at chambers.†

An *ex parte* application, at chambers, for an *interim* injunction to restrain the defendant from negotiating a bill of exchange, obtained without any consideration, until action, was granted by Lindley, J.‡

An injunction was granted on motion in Court, *ex parte*, before service of the writ, to restrain a female defendant from dealing with the estate of an intestate, whose widow she claimed to be, and of whose personal estate she had possessed herself, her claim being denied by the intestate's next of kin.§

In the following cases the application was unsuccessful:—

An *ex parte* application for payment of money into Court, pending a summons for an injunction to restrain paying it away, was refused by Lush, J., at chambers, under special circumstances.||

An *ex parte* application for an injunction to restrain the defendant from parting with oats and straw, when an action of trover was pending respecting them, was refused by Quain, J., at chambers.¶

An *ex parte* application for an injunction to restrain

* *Tozer v. Walford*, 1 Charley's Cases (Chambers), 16; Coe's Practice of Judges' Chambers, 135.

† 2 Charley's Cases (Chambers), 5. ‡ 2 Charley's Cases (Chambers), 6.

§ *Brand v. Mitson* (otherwise *Brand*), 45 L. J. (P. D. & A.), 41; 34 L. T., 854; 24 W. R., 524; 2 Charley's Cases (Court), 83.

|| *Lusher v. The Comptoir d'Escompte de Paris*, 1 Charley's Cases (Chambers), 12. ¶ 1 Charley's Cases (Chambers), 14.

the defendant from parting with oats and straw which had been sold, pending an action for the price of them, until the plaintiff should have inspected them, was refused by Quain, J., at chambers.*

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An *ex parte* application at chambers for an injunction to restrain the plaintiff from building on a particular road, so as to obliterate the defendant's landmarks, was refused, the building having been already erected.†

An application at chambers for an injunction to the defendant, in an action for the obstruction of light and air, to take down a hoarding erected by him, was refused by Huddleston, B., as the plaintiff claimed an injunction in his action, and the defendant had a perfect right to keep up the hoarding until the trial.‡

An application at chambers for an injunction to restrain purchasers of property from the defendant, in an action on two bills of exchange, from paying the purchase money, was refused by Quain, J. "The purchasers," said his lordship, "are not parties to the action. The plaintiff has no lien or claim upon the money at all. *He is attempting to get an attachment before judgment.*"§

An *ex parte* application at chambers for an injunction to restrain the defendant, who was the plaintiff's landlord, from distraining for rent, pending an action by the defendant against him, on an agreement to repair, was refused by Lindley, J., no notice of the application having been given to the defendant.||

An *ex parte* application at chambers for an *interim* injunction to restrain the defendant, in an action of trespass, from driving over the plaintiff's land and so destroying the grass, was refused by Lindley, J.¶ The plaintiff

* *Fowler v. Lewy*, 1 Charley's Cases (Chambers), 14.

† *Williams v. Wright*, 1 Charley's Cases (Chambers), 15.

‡ 1 Charley's Cases (Chambers), 17. § *Ib.*

|| 1 Charley's Cases (Chambers), 18. "It sometimes happens," says Mr. Coe, in his learned work on "The Practice of Judges' Chambers," p. 135, "that upon an *ex parte* application the Judges will order a summons to issue, calling upon the defendant to show cause why the injunction should not be issued."

¶ *Makin v. Barrow*, 2 Charley's Cases (Chambers), 6; Coe's Practice of Judges' Chambers, 135.

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subsequently applied at chambers for the *interim* injunction on summons, but Denman, J., refused to grant it.*

In the following cases, applications were successfully made, under this subsection, for the appointment of receivers:—

Mortgagees, who, as to part of the property, were legal, and as to part equitable mortgagees, the estates being intermixed, applied by motion in Court for the appointment of a receiver. Vice-Chancellor Bacon, being of opinion that it was “just and convenient,” acceded to the application.†

A receiver was appointed on motion in Court *ex parte*, before service of the writ, on behalf of a widow and orphans, whose property was embarked under a will by the trustees of the will in a business undertaking which was in danger of failure, and in which one of the trustees had blended money of his own with the trust fund.‡

A receiver was appointed on motion in Court, at the instance of the defendant, before judgment, although the plaintiff had already given notice of motion for the appointment of a receiver. The plaintiff, however, was appointed.§

On an *ex parte* application by the plaintiff, before the defendant’s appearance, for the appointment of a receiver, in an action for the specific performance of a verbal agreement by the defendant to execute a bill of sale of his furniture, there being imminent danger of the defendant’s bankruptcy, the usual order was made by Bacon, V.C., for a reference to chambers to appoint a receiver. The Court of Appeal added to the order an appointment of the plaintiff to act as *interim* receiver without security for fourteen days or until a receiver should be appointed under the Vice-Chancellor’s order.||

* *Makin v. Barrow*, 2 Charley’s Cases (Chambers), 6.

† *Pease v. Fletcher*, 1 Ch. D., 273; 45 L. J. (Ch.), 265; 1 Charley’s Cases (Court), 35.

‡ *H. v. H.*, 1 Ch. D., 276; 24 W. R., 317; 2 Charley’s Cases (Court), 80.

§ *Sargant v. Read*, 1 Ch. D., 600; 45 L. J. (Ch.), 206; 2 Charley’s Cases (Court), 81.

|| *Taylor v. Eekersley*, 2 Ch. D., 302; 45 L. J. (Ch.), 527; 2 Charley’s Cases (Court,) 84.

In the following case the application for the appointment of a receiver under this subsection was unsuccessful:—

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An application was made *ex parte*, at chambers, for a receiver by the landlord of a house, in an action of ejectment against the tenant, to prevent the house from falling into decay for want of repair. Quain, J., refused to make any order *ex parte*, and doubted if an order could be granted in such a case even on notice.*

For further cases on this subsection, see notes to Order LII., *infra*.

Subsection (9.) "The ancient rule of the Court of Admiralty," as it is termed by Lord Stowell, is tersely described by Dr. Lushington in the case of *The Linda*.† "It was decided the other day that both these vessels were to blame for the collision. According to the law of this Court the damage arising therefrom is to be divided between the owners of the two vessels; if there had been a cross action, the cost of the damage received by both vessels would also have been equally divided. At Common Law the case is different; there the plaintiff can recover nothing unless he shows that he was free from all blame." So inexorably was this principle applied, that the innocent owner of the cargo on board the sunken vessel could only recover a moiety of his damage from the owners of the vessel that sunk her, where both vessels were to blame for the collision.‡

The Admiralty rule has been accepted by Cleirac, Valin, Kuricke, Grotius, Van der Linden, Vennius, Emerigon, Pardessus, Boulay-Paty, and Pailliet, and is the law of the French "Code de Commerce." § It has, however, been called the *judicium rusticorum*, the rule of arbitrators who compromise when they cannot decide. ¶

As this subsection originally stood, it abolished the Admiralty rule, and substituted for it the Common Law rule.

* *Habershon v. Gill*, 1 Charley's Cases (Chambers), 14.

† 4 Jur. (N.S.), 146.

‡ See *The Milan*, Lush., 388.

§ Code de Com., art. 407.

¶ MacLachlan on Merchant Shipping, 2nd edit., p. 287.

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Lord Selborne, C., thus explained this subsection, as it originally stood, in his opening remarks on the introduction of the present measure in 1873 :—

“In respect of collisions at sea it is proposed to adopt, instead of a rule which now holds good in the Court of Admiralty, the rule of Common Law as to contributory fault or contributory negligence. The rule of law is, that if the plaintiff is equally in the wrong, he cannot recover from the defendant, and if the defendant is equally in the wrong, he cannot recover from the plaintiff. But what the Court of Admiralty does is this. If two ships run into each other and both go to the bottom, as I understand the practice, the Court of Admiralty adds the value of both ships, and then divides the total between the two parties. So that if I were the owner of a ship worth only £10,000, and one of your lordships was the owner of one worth £50,000, you see how ill I would fare in comparison with the owner of the better ship, if both vessels went down after a collision.” *

The learned Registrar of the Court of Admiralty,† addressed an exceedingly able letter to Lord Selborne, in defence of the rule of the Court of Admiralty, which led not merely to the preservation of the rule of the Court of Admiralty in the Admiralty Division of the High Court, but to its extension to the other Divisions of that Court, in substitution for Common Law rule.

The letter which brought about this remarkable change has fortunately been preserved by Mr. David Maclachlan, in the second edition of his celebrated “Treatise on the Law of Merchant Shipping;”‡ and it is here reproduced :—

“I will take your lordship’s figures, and will assume that A. and B. are the owners of two vessels worth respectively £10,000 and £50,000 : that they came into collision, and that both alike are to blame for the collision, that being a condition precedent to the equal division of the damages. And, first, I will assume that A.’s vessel goes to the bottom, and that B.’s is uninjured, not a very unusual occurrence

* Hansard’s Parliamentary Debates, 3rd Series, vol. 214, p. 340.

† Mr. Rothery.

‡ P. 287, n. (2.)

in collisions at sea. Then A., who has lost £10,000 by the sinking of his vessel, would, under the Admiralty rule, be entitled to recover one half of his loss, or £5,000 from B. Secondly. Let us assume that B.'s vessel goes to the bottom, and that A.'s is uninjured; then B., who has lost £50,000 by the sinking of his vessel, will be entitled to recover one moiety of his loss, or £25,000 from A. Thirdly, I will suppose that both go to the bottom; then A., having lost £10,000 by the sinking of his vessel, is entitled to recover £5,000 from B., for a moiety of his damage, whilst B. is entitled to recover £25,000 from A. for the moiety of his damage. *Each loses £30,000*; A., by having to bear the loss of the moiety of his own vessel, or £5,000, and by having to pay to B. £25,000 for the moiety of his, B.'s, loss; and B. by having to bear the loss of one moiety of his own vessel, or £25,000, and by having to pay to A. £5,000 for the moiety of his, A.'s loss. The mistake of those who think that the owner of a vessel worth £10,000 might, by a collision with a vessel worth £50,000, recover, under the Admiralty law, no less a sum than £30,000* as compensation, arises from their supposing that the amount at stake is a common fund to be divided between two claimants, not a *joint loss* which has to be apportioned between them.

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“Let us now see what the result would be under the Common Law rule, where, if both are to blame, neither can recover anything. In the first of the three cases cited above, the whole loss of £10,000 would fall upon A.; in the second the whole loss of £50,000 would fall upon B.; and in the third case, B.'s loss would be £50,000, while A.'s loss would be only £10,000, or one-fifth part that of B.”

The learning on the subject-matter of the 10th subsection will be found in Spence on the Equitable Jurisdiction; Story's Equitable Jurisprudence; Forsyth on the Custody of Infants; and Macpherson on the Laws of Infants. The Sovereign, as *parens patriæ*, has the care of infants, or rather of their property, where there is nobody else to take care of them or it, or when there is somebody else, and he neglects his duty; and this prerogative of the

* i.e., £10,000 + £50,000 = £60,000; £60,000 ÷ 2 = £30,000.

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c. 25.

Sovereign is wielded by the Court of Chancery. The Court of Chancery is a thoroughly domestic forum as regards infants, whom (or whose property) it takes under its beneficent sway. It will deprive even the father, if grossly immoral or cruel, of the custody of his children, will regulate the conduct of guardians, appoint them and remove them at pleasure, assist them in compelling their wards to go to school, arrest and imprison anyone who, without its permission, marries or otherwise interferes with infants under its care for contempt of Court, will intercept by injunction all communications between its ward and an ineligible admirer, will direct a suitable maintenance or match for its infants, and control them in the management of their property. How much more consonant with reason and justice are the rules of Equity, in questions relating to the custody and education of infants, than those of the Common Law, is well illustrated by the recent case of *Andrews v. Salt*.

Thomas Andrews, a Roman Catholic, entered into a parol antenuptial engagement with Ellen Fleetcroft, a Protestant, that of the issue of their intended marriage the males should be educated in the religion of their father, the females in that of their mother. There was issue of the marriage (which was solemnized in March, 1854) a son and a daughter. The son was baptized and brought up as a Roman Catholic. The daughter, who was born in June, 1862, was baptized as a Protestant, with Protestant sponsors. Thomas Andrews died when his little daughter Ellen, was only nine months old. Ellen lived with her maternal grandmother (the widow having married again), attended a Protestant Church, and was brought up in the principles of the Protestant religion, without any objection from anyone, until she was nine years of age. In 1871 her paternal uncle, Joseph Andrews, obtained a rule in the Court of Queen's Bench, calling upon the minor's maternal grandmother to show cause why a writ of *Habeas Corpus* should not issue directing her to bring up the body of Ellen Andrews, in order that she might be handed over to the custody of her paternal uncle, as her testamentary guardian. It then appeared that exactly two days before his death Thomas Andrews executed a will which appointed

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s. 25.

his brother Joseph testamentary guardian of his children.* As the testator had no property, the will does not seem to have contained anything else except this appointment. The Court of Queen's Bench held that they had no discretion to refuse the writ. "It is with great regret," said Mr. Justice Archibald, "that notwithstanding the lateness of the application, and the apparent harshness of such a proceeding towards the grandmother of the child, we have no discretion to refuse the writ, and we are bound to hand over the child to the custody of the testamentary guardian."†

The absurdity and cruelty of this decision is at once apparent, and yet the Court of Queen's Bench was "bound" by the iron fetters of Statute and Case Law so to decide. The intervention of the Court of Chancery was invoked, and successfully invoked, by the child's maternal relatives. Vice-Chancellor Malins granted an injunction to restrain the paternal uncle, Joseph Andrews, from interfering with the custody or education of the child, and for the settlement of a proper scheme for her education, and for the appointment of a guardian. On an appeal to the Lords Justices the decision of the Vice-Chancellor was affirmed,‡ on the ground that when a father has forfeited or abandoned his right to educate his children in his own religion, the Court of Chancery will consider only the happiness and benefit of the child, and will order it to remain in the care of those by whom it has been brought up, and to be educated in their religion.

An absurd ceremony had in this case to be performed before the aid of the Court of Chancery could be invoked. The mother's relatives had to put £20 in the name of trustees for the child, and then file a bill to make her a ward in Chancery, and to administer the trust money! The Court of Chancery could then, but not till then, interfere, because it was dealing with trust property, and with the guardianship of its own ward, and not with legal rights and Acts of Parliament.

By s. 34 of this Act, "the wardship of infants, and the

* Under 12 Car. 2, c. 24, s. 8.

† L. R., 8 Q. B., 153, 160.

‡ L. R., 8 Ch. App., 622.

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s. 25.

care of infants' estates," are assigned to the Chancery Division of the High Court. When, therefore, it is stated in this subsection that, "in questions relating to the custody and education of infants, the rules of Equity shall prevail," it is not, it is apprehended, meant that the jurisdiction expressly conferred upon the Chancery Division of the High Court shall be conferred upon the Common Law Divisions of the High Court, but that, when, *e.g.*, the Court of Queen's Bench is called upon to issue a writ of *Habeas Corpus* under circumstances like those in *Andrews v. Salt*, that Court will be bound to take judicial notice of the countervailing rules of Equity, and to hold them to be paramount to, and to override the narrow view to which the Court has hitherto been compelled to give effect. This being so, it will, it is apprehended, be wholly unnecessary to invest, in a like case, £20 in the names of trustees, and to make the infant a ward in Chancery, in order to secure what subsection (7) of section 24 calls "a complete and final determination of the matter in controversy between the parties."

In the case of *In Re Goldsworthy** the Common Pleas refused a writ of *habeas corpus* under this subsection.

Subsec. (11) of this section introduces an important new rule respecting conflicting rules of Equity and Common Law.

"The rules of Equity here mean the principles of Equity," "equitable doctrines, not rules of practice."†

Lord Selborne, C., when introducing the present measure, alluded to this subsection:—

"It may be asked, why not abolish at once all distinction between law and equity? I can best answer that by asking another question—do you wish to abolish trusts? If trusts are to continue, there must be a distinction between what we call a legal estate and an equitable estate. The legal estate is in the person who holds the property of another; the equitable estate is in the person beneficially interested. The distinction, within certain limits, between law and equity is real and natural, and it would be a mistake to suppose that what is real and natural ought to be disregarded, although under our present system it is often

* 2 Q. B. D., 75.

† Per Lord Coleridge, C.J., in *Schröder v. Clough*, *Times*, Jan. 16th, 1877.

pushed beyond these limits. I content myself with saying that those rights and remedies which belong to the system of law and jurisdiction under which we actually live, and which are consistent with each other, should be equally recognised, and effect given to them in all branches of the Court. . . . On the suggestion of a high authority I have added in the Bill general words to provide that where there is any variance between the rules of law and those of equity, and the matter is not expressly dealt with, the rules of equity shall prevail.”*

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As to this subsection, see per Jessel, M.R., in *Bustros v. White*,† and per Bacon, V.C., in *Lascelles v. Butt*.‡

By section 91 of this Act, *infra*, the several rules of law enacted and declared by the present section are to be in force and receive effect in all Courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognisable by such Courts.

PART III.

SITTINGS AND DISTRIBUTIONS OF BUSINESS.

Section 26.—Abolition of Terms.

The division of the legal year into terms shall be abolished, so far as relates to the administration of justice; and there shall no longer be terms applicable to any sitting or business of the High Court of Justice, or of the Court of Appeal, or of any Commissioners to whom any jurisdiction may be assigned under this Act; but in all other cases in which, under the law now existing, the terms into which the legal year is divided are used as a measure for determining the time at or within

* Hansard's Parliamentary Debates, 3rd Series, vol. 214, p. 339.

† 1 Q. B. D., 423; 45 L. J. (Q.B.), 642; 34 L. T., 835; 24 W. R., 721.

‡ 2 Ch. D., 588; 24 W. R., 659.

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s. 26.

which any act is required to be done, the same may continue to be referred to for the same or the like purpose, unless and until provision is otherwise made by any lawful authority. Subject to Rules of Court, the High Court of Justice and the Court of Appeal, and the Judges thereof respectively, or any such Commissioners as aforesaid, shall have power to sit and act, at any time, and at any place, for the transaction of any part of the business of such Courts respectively, or of such Judges or Commissioners, or for the discharge of any duty which by any Act of Parliament, or otherwise, is required to be discharged during or after term.

It will be perceived that terms are not entirely abolished by this section (as the title of the section would seem to imply), but only "so far as relates to the administration of justice."

The Rules of Court regulating the sittings and vacations will be found in the Rules of the Supreme Court, Order LXI.

A curious result of this section may be noted. The right of junior barristers to move the Court on the last day of Term, in priority to Her Majesty's Counsel, ceased when this section came into operation.*

Section 27.—Vacations.

Her Majesty in Council may from time to time, upon any report or recommendation of the Judges by whose advice Her Majesty is hereinafter authorised to make Rules before the commence-

* *Anon*, *Times*, Dec. 22nd, 1857; 1 *Charley's Cases* (Court), 39. (Per the Lord Chief Justice of England.)

ment of this Act, and after the commencement of this Act upon any report or recommendation of the Council of Judges of the Supreme Court hereinafter mentioned, with the consent of the Lord Chancellor, make, revoke, or modify, orders regulating the vacations to be observed by the High Court of Justice and the High Court of Appeal, and in the offices of the said Courts respectively; and any Order in Council made pursuant to this section shall, so long as it continues in force, be of the same effect as if it were contained in this Act; and Rules of Court may be made for carrying the same into effect in the same manner as if such Order in Council were part of this Act. In the meantime, and subject thereto, the said vacations shall be fixed in the same manner, and by the same authority, as if this Act had not passed. This section shall come into operation immediately upon the passing of this Act.

This section being expressly excepted from section 2, *supra*, came in force on the 5th of August, 1873.

The Rules of Court regulating vacations will be found, as already stated, in Order LXI. of the Rules of the Supreme Court.

By section 17 of the Act of 1875, "the reference to certain Judges in section 27 of the Principal Act shall be deemed to refer to the Judges mentioned in that section as the Judges on whose recommendation an Order in Council may be made," before the commencement of the Acts, namely, "the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron, and the Lords Justices of Appeal in Chancery, or any five

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of them, and the other Judges of the several Courts intended to be united and consolidated by the Principal Act as amended by" that "Act, or a majority of such other Judges."

As to the Council of Judges, see s. 75, *infra*.

SECTION 28.—*Sittings in Vacation.*

Provision shall be made by Rules of Court for the hearing, in London or Middlesex, during vacation by Judges of the High Court of Justice and the Court of Appeal respectively, of all such applications as may require to be immediately or promptly heard.

The "provision" expressly "made" pursuant to this section, will be found in the Rules of the Supreme Court, Order LXI., Rules 5 and 6. If no Divisional Court is sitting, an application should be made to the Vacation Judge to enlarge the time for appealing. *Crom v. Samuel*, 2 C. P. D., 21; 35 L. T., 423; 25 W. R., 45.

SECTION 29.—*Jurisdiction of Judges of High Court on Circuit.*

Her Majesty, by Commission of Assize or by any other commission, either general or special, may assign to any Judge or Judges of the High Court of Justice or other persons usually named in Commission of Assize, the duty of trying and determining within any place or district specially fixed for that purpose by such commission, any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter depending in the said High Court, or the exercise of any civil or

criminal jurisdiction capable of being exercised by the said High Court; and any commission so granted by Her Majesty shall be of the same validity as if it were enacted in the body of this Act; and any Commissioner or Commissioners appointed in pursuance of this section shall, when engaged in the exercise of any jurisdiction assigned to him or them in pursuance of this Act, be deemed to constitute a Court of the said High Court of Justice; and, subject to any restrictions or conditions imposed by Rules of Court and to the power of transfer, any party to any cause or matter involving the trial of a question or issue of fact, or partly of fact and partly of law, may, with the leave of the Judge or Judges to whom or to whose Division the cause or matter is assigned, require the question or issue to be tried and determined by a Commissioner or Commissioners as aforesaid, or at sittings to be held in Middlesex or London as hereinafter in this Act mentioned, and such question or issue shall be tried and determined accordingly.

A cause or matter not involving any question or issue of fact may be tried and determined in like manner with the consent of all the parties thereto.

As to circuits, see sections 11, 26, 37, 76, and 93 of this Act. As to the re-arrangement of circuits, see section 23 of the Supreme Court of Judicature Act, 1875, and the Orders in Council made under that section, "as to Judge's circuits," on the 5th February, 17th May, and 27th June, 1876, the Winter Assizes Act, 1876 (39 & 40 Vict. c. 57), and the Orders in Council of the 23rd October, 1876,

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made under it. As to trials on circuit, see Order XXXVI. of the Rules of the Supreme Court.

“Commission of Assize.” The abolition of Assizes, and other real actions has thrown the Commission of Assize, as distinguished from the Commission of Nisi Prius, out of force.*

“Or any other commission.” There are practically now four several authorities, by virtue of which Judges sit upon circuit†:—1. The Commission of the Peace; 2. A Commission of Oyer and Terminer; 3. A Commission of General Gaol Delivery; 4. A Commission of Nisi Prius. The Judicature Commission in their First Report‡ made the following recommendation:—“We think that in lieu of the ordinary Assize commissions, *one Commission only* should be necessary for each circuit.” In their Second Report§ they recommended “that actions to be tried elsewhere than in the Metropolis, or Liverpool, or Manchester, should be tried under commissions to be issued from time to time by your Majesty for the trial of causes *at any place or places* named in such commissions.” By s. 26, *supra*, Commissioners of Assize may “sit at any time and at any place.”

The “other persons usually named” are specified in section 37, *infra* (which must be read in connection with this section), *i.e.*, “any Serjeant-at-law, or any of Her Majesty’s Counsel learned in the law;”|| “any Judge or Judges of the High Court of Justice.” Section 37 enables Her Majesty to include in any such commission “any Ordinary Judge of the Court of Appeal.” Hitherto the Ordinary Judges of the Court of Appeal have not gone circuit; but s. 15 of the Appellate Jurisdiction Act, 1876, imposes on “every Additional Ordinary Judge of the Court of Appeal,” appointed under that Act, the “obligation to go circuits (*sic*) and to act as Commissioner of Assize.”

“Any Commissioner shall be deemed to constitute a Court.” A similar provision will be found in sections 30

* Stephen’s Commentaries, 7th edit., vol. 3, p. 352.

† See the 5th Report of the Judicature Commission, p. 48. (2nd Appendix on Courts and Assizes.)

‡ P. 17.

§ P. 21.

|| See 13 & 14 Vict. c. 25, which also includes in the same category as Serjeants and Queen’s Counsel, Barristers having a patent of precedence.

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and 39, as to a single Judge constituting “a Court.” (See now, as to the powers of single Judges, section 17 of the Appellate Jurisdiction Act, 1876.)

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“Rules of Court.” Order XXXVI., Rule 29, of the Rules of the Supreme Court, expressly refers to this section :—

“In any cause the Court or a Judge of the Division to which the cause is assigned, may, at any time or from time to time, order the trial and determination of any question or issue of fact, or partly of fact and partly of law, by any Commissioner or Commissioners appointed in pursuance of the 20th section of the said Act, or at the sittings to be held in Middlesex or London, and such question or issue shall be tried and determined accordingly.” *

Rule 1 of the same Order states that “where no place of trial is named in the statement of claim, the place of trial shall, unless a Judge otherwise orders, be the county of Middlesex, and that any order of a Judge as to the place of trial may be discharged or varied by a Divisional Court of the High Court.”

See further, as to the place of trial, Rule 6 of the same Order, and also Order XXXV., Rules 12, 13, 14 and 15, as to the removal of actions from the District Registry to London, *i.e.*, to the Central Offices of the High Court.

“The power of transfer.” See section 36, *infra*; also Order II., Rules 1 and 2 of the Rules of the Supreme Court, and subsection (2) of section 11 of the Supreme Court of Judicature Act, 1875.

SECTION 30.—*Sittings for trial by Jury in London and Middlesex.*

Subject to Rules of Court, sittings for the trial by jury of causes and questions or issues of fact shall be held in Middlesex and London, and such sittings shall, so far as is reasonably practicable, and subject to vacations, be held continuously throughout the year by as many Judges as the

* See, as to this Rule, Rule 4 of the Rules of the Supreme Court, Dec., 1876, *infra* (Order XXXVI., Rule 29A).

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s. 30.

business to be disposed of may render necessary. Any Judge of the High Court of Justice sitting for the trial of causes and issues in Middlesex or London, at any place heretofore accustomed, or to be hereafter determined by Rules of Court, shall be deemed to constitute a Court of the said High Court of Justice.

“Subject to Rules of Court.” By Order V., Rule 1 of the Rules of the Supreme Court, “in any action, other than a Probate action, the plaintiff, wherever resident, may issue a writ of summons out of the Registry of any district. If the defendant resides within the district, he *must*, by Order XII., Rule 2, of the same Rules, appear to such a writ in the District Registry. But by Order XXXV., Rule 13, any party to the action may apply for an order to remove the action to London; and, in the cases specified in Rules 11 and 11A of Order XXXV., the defendant may remove the action to London, *as of right*. The Rules of Court relative to trials in Middlesex and London will be found in Order XXXVI.*

The “place heretofore accustomed” as to “London,” *i.e.*, the City, is the Guildhall.

This section contains a most beneficial enactment, that “the sittings in Middlesex and London shall, so far as is reasonably practicable, and subject to vacation, be held CONTINUOUSLY THROUGHOUT THE YEAR.” The number of remanets left in the Court of Queen’s Bench at Guildhall was a disgrace to our system of Judicature, and the Judges of that Court were powerless to remedy it. This enactment is based on the recommendations of the Judicature Commission. In their first Report they said: “These sittings should be held continuously throughout the legal year.” In their Second Report they referred to and enforced their previous recommendation.

* A Chancery Judge cannot be required to try an action by jury unless he is sitting at *nisi prius*. See Order XXXVI., Rule 29A, *infra*, and the cases there cited.

† P. 16. (Exclusive of course, of Vacations, as to which see Order LXI. of the Rules of the Supreme Court.)

The case of *Frost v. Field* afforded a striking illustration of the increased despatch of legal business at the Middlesex sittings. It was tried for the first time on the 3rd of December, 1875, before Mr. Justice Blackburn, when the jury were discharged, being unable to agree. The plaintiff thereupon gave fresh notice of trial, and set down the action for the same sittings. It was tried a second time before Mr. Baron Pollock, on the 21st of December, 1875, i.e., within three weeks of the former trial.*

“Any Judge shall be deemed to constitute a Court.” A similar provision occurs in sections 29 and 39 as to a single Judge constituting a Court. (See now sect. 17 of the Appellate Jurisdiction Act, 1876, as to the powers of a single Judge.)

SECTION 31.—*Divisions of the High Court of Justice.*

For the more convenient despatch of business in the said High Court of Justice (but not so as to prevent any Judge from sitting, whenever required, in any Divisional Court, or for any Judge of a different Division from his own), there shall be in the said High Court five Divisions consisting of such number of Judges respectively as hereinafter mentioned. Such five Divisions shall respectively include immediately on the commencement of this Act, the several Judges following; (that is to say),

- (1.) One Division shall consist of the following Judges; (that is to say), the Lord Chancellor, who shall be President thereof, the Master of the Rolls, and the Vice-Chancellor of the Court of

* *Frost v. Field*, *Times*, Dec. 22nd, 1875; 1 Charley's Cases (Court), 40.

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Chancery, or such of them as shall not be appointed Ordinary Judges of the Court of Appeal :

- (2.) One other Division shall consist of the following Judges ; (that is to say), The Lord Chief Justice of England, who shall be President thereof, and such of the other Judges of the Court of Queen's Bench as shall not be appointed Ordinary Judges of the Court of Appeal :
- (3.) One other Division shall consist of the following Judges ; (that is to say), The Lord Chief Justice of the Common Pleas, who shall be President thereof, and such of the other Judges of the Court of Common Pleas as shall not be appointed Ordinary Judges of the Court of Appeal :
- (4.) One other Division shall consist of the following Judges ; (that is to say), The Lord Chief Baron of the Exchequer, who shall be President thereof, and such of the other Barons of the Court of Exchequer as shall not be appointed Ordinary Judges of the Court of Appeal :
- (5.) One other Division shall consist of two Judges who, immediately on the commencement of this Act, shall be the existing Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes and the existing

Judge of the High Court of Admiralty, unless either of them is appointed an Ordinary Judge of the Court of Appeal. The existing Judge of the Court of Probate shall (unless so appointed) be the President of the said Division, and subject thereto the Senior Judge of the said Division, according to the order of precedence under this Act, shall be President.

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The said five Divisions shall be called respectively the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division.

Any deficiency of the number of five Judges for constituting, in manner aforesaid, immediately on the commencement of this Act, any one or more of the Queen's Bench, Common Pleas, and Exchequer Divisions, may be supplied by the appointment, under Her Majesty's Royal Sign Manual, either before or after the time fixed for the commencement of this Act, of one of the Puisne Justices or Junior Barons of any Superior Court of Common Law from which no Judge may be appointed as aforesaid to the Court of Appeal, to be a Judge of any Division in which such deficiency would otherwise exist. And any deficiency of the number of three Vice-Chancellors or of the two Judges of the Probate and Admiralty Divisions at the time of the commencement of

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this Act may be supplied by the appointment of a new Judge in his place in the same manner as if a vacancy in such office had occurred after the commencement of this Act.

Any Judge of any of the said Divisions may be transferred by Her Majesty, under Her Royal Sign Manual, from one to another of the said Divisions.

Upon any vacancy happening among the Judges of the said High Court, the Judge appointed to fill such vacancy shall, subject to the provisions of this Act, and to any Rules of Court which may be made pursuant thereto, become a member of the same Division to which the Judge whose place has become vacant belonged.

It will be perceived that the utmost respect has been shown by the Legislature to the Conservative instincts of the legal profession in framing this section. There will, practically, be no "outward and visible" manifestation of the union of the Superior Courts of Law and Equity into one Supreme Court. The Courts will generally sit, at least until the Palace of Justice is completed, in the "place heretofore accustomed." The concurrent administration of the principles of law and equity by each of the existing Courts, the infusion of the spirit and the transferring of many of the forms of Chancery pleading and practice into the Common Law Divisions, and *vice versa*—these will be the plastic influences which will gradually but surely mould the five Divisions of the High Court into one complete and harmonious whole.

The distribution of the High Court of Justice into "Divisions," and not only so but into the precise number of five Divisions, was suggested by the Judicature Commissioners in their First Report* :—

"The Supreme Court would, of course, be divided into as many Chambers or Divisions as the nature and extent or the convenient despatch of business might require.

Act 1873,
s. 31.

. We consider it expedient, *with a view to facilitate the transition* from the old to the new system, and to make the proposed change at first as little inconvenient as possible, that the Courts of Chancery, Queen's Bench, Common Pleas and Exchequer should, *for the present*, retain their distinctive titles, and should constitute so many Chambers of the Supreme Court, and as regards the Courts of Admiralty, Divorce and Probate, we think it would be convenient that those Courts should be consolidated, and form one Chamber or Division of the Supreme Court."

The words in brackets—"but not so as to prevent any Judge from sitting, whenever required, in any Divisional Court, or for any Judge of a different Division from his own,") are founded on the following passage in the First Report of the Judicature Commission:—"From the consolidation of all the present Superior Courts into one Supreme Court it follows that all the Judges of those Courts will become Judges of the Supreme Court; and thus *every Judge, though belonging to a particular Division, will be competent to sit in any Division* of the Court, whenever it may be found convenient for the administration of Justice." This interchangeability, so to speak, of all the Judges, will lead, it may reasonably be expected, to a considerable increase in judicial power.

As to "the existing Judge of the High Court of Admiralty," see section 8 of the Amending Act, the provisions of which will account for the precedence given by subsection (5) of the present section to the existing Judge of the Court of Probate.

The full title of the fifth Division of the High Court is "The Probate, Divorce and Admiralty Division;" but the subject-matter before the Court must be indicated by the addition of the word "Probate," "Divorce," or "Admiralty," as the case may be. Documents will not, however, be rejected or invalid on account of not having the

* Page 9. As to the words in brackets, see *Hillman v. Mayhew*, 1 Ex. D., 132.

Act 1873,
s. 31.

full title,* the expressions "Probate Division," "Divorce Division," or "Admiralty Division," being sanctioned both by the new Acts and the new Rules.

It is important to observe that notwithstanding the distribution of the High Court by these sections into Divisions, these Divisions are so far to be deemed distinct and separate, that the Judges sitting in *banco* in one Division are bound, on appeal to them from a Judge at chambers, in an action commenced in another Division, to follow the decision of the Judges of the latter Division, even although it be against their own opinion.† The case in which this was decided was in an action in the Exchequer Division. The plaintiffs appealed to the Queen's Bench Division from Pollock, B., at chambers, who refused (according to the practice in Exchequer actions) to make an order for the inspection of the report of the surgeon of the defendant Company as to the condition of the plaintiff's wife who had been injured on their tramway. The Queen's Bench Division, although they did not agree with the practice in the Exchequer Division, upheld the decision of Mr. Baron Pollock, on the ground, as stated by the Lord Chief Justice of England, that, "as this was an Exchequer cause, they were bound to follow the decision of the Judges of the Exchequer Division."

The five Divisions may (section 32) be altered by Order in Council on the recommendation of the Council of Judges.

It will be seen that this section contemplates a reduction in the number of Judges of each of the three Common Law Divisions from 6 to 5. This was intended to carry out the provision of section 5 of this Act, *supra*, that there should be only 5 Judges of each of these Divisions, i.e., the Chief and four Puisnes. The passage in section 5 of this Act, reducing the number of Judges of the three Common Law Divisions from 18 to 15, was repealed by section 3 of the Supreme Court of Judicature Act, 1875. No corresponding alteration in the present

* *Anon.*, *Times*, Nov. 10th, 1875; 1 Charley's Cases (Court), 41.

† *Pacey and Wife v. The London Tramway Company*, *Times*, Thursday, March 23rd, 1876; 2 Charley's Cases (Court), 86.

section was at the same time made, but the arrangement for supplying a "deficiency" in the number of the Judges of the three Common Law Divisions evidently became a dead letter when the Legislature in 1875 determined that there should be, as theretofore, 6 Judges in each of the Common Law Divisions. This point is of some interest now that Lord Selborne's original scheme for reducing the number of Judges of the three Common Law Divisions from 18 to 15 has been practically re-enacted by section 15 of the Appellate Jurisdiction Act, 1876. The present section has since the 1st of November, 1876, been in harmony with the existing state of things.

Act 1873,
s. 31.

SECTION 32.—*Power to alter Divisions by Order in Council.*

Her Majesty in Council may, from time to time, upon any report or recommendation of the Council of Judges of the Supreme Court hereinafter mentioned, order that any reduction or increase in the number of Divisions of the High Court of Justice, or in the number of the Judges of the said High Court who may be attached to any such Division, may, pursuant to such report or recommendation, be carried into effect; and may give all such further directions as may be necessary or proper for that purpose; and such Order may provide for the abolition on vacancy of the distinction of the offices of any of the following Judges, namely, the Chief Justice of England, the Master of the Rolls, the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer, which may be reduced, and of the salaries, pensions, and patronage

Act 1873,
s. 32.

attached to such offices, from the offices of the other Judges of the High Court of Justice, notwithstanding anything in this Act relating to the continuance of such offices, salaries, pensions, and patronage; but no such Order of Her Majesty in Council shall come into operation until the same shall have been laid before each House of Parliament for thirty days, on which that House shall have sat, nor if, within such period of thirty days, an address is presented to Her Majesty by either House of Parliament, praying that the same may not come into operation. Any such Order, in respect whereof no such address shall have been presented to Her Majesty, shall, from and after the expiration of such period of thirty days, be of the same force and effect as if it had been herein expressly enacted: Provided always, that the total number of the Judges of the Supreme Court shall not be reduced or increased by any such Order.

In the passages cited from the First Report of the Judicature Commission* under the preceding section, it will be seen that it is "for the present" only that the Commissioners recommended that the existing Courts should, when they become Divisions of the Supreme Court, "retain their distinctive titles, with a view," merely, "to facilitate the transition." The same considerations evidently induced the framers of the preceding section to retain the time-honoured titles of the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer. The present section enables Her Majesty in Council,

when the temporary purpose for which these titles, like those of the Superior Courts, were retained, has been served to sweep away, on vacancies occurring, all distinction between these ancient and lofty titles and those of the Puisne Judges; also to reduce or increase *ad libitum* the number of the Divisions of the High Court. The alteration in the number of the Divisions of the High Court can only be made by Her Majesty in Council "upon any report or recommendation of the Council of Judges;" but it would seem, from the peculiar wording of the section, that the titles, salaries, and pensions of the three Common Law Chiefs and of the Master of the Rolls can be reduced by Her Majesty in Council, *mero motu*, independently of the Council of Judges (as to which, see s. 75, *infra*).

Act 1873,
s. 32.

As a set-off against this levelling edict *in posse*, may be set the language *in esse* of the 5th section of this Act, *supra*: "All persons *to be hereafter appointed to fill* the places of the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, *and their successors, respectively*, shall CONTINUE to be appointed to the same respective offices, with the same precedence and by the same respective titles, and in the same manner respectively, *as heretofore*."

SECTION 33.—*Rules of Court to provide for distribution of business.*

All causes and matters which may be commenced in, or which shall be transferred by this Act to, the High Court of Justice, shall be distributed among the several Divisions and Judges of the said High Court, in such manner as may from time to time be determined by any Rules of Court, or Orders of Transfer, to be made under the authority of this Act; and in the meantime, and subject thereto, all such causes and matters

Act 1873,
s. 33.

shall be assigned to the said Divisions respectively in the manner hereinafter provided. Every document by which any cause or matter may be commenced in the said High Court shall be marked with the name of the Division, or with the name of the Judge, to which or to whom the same is assigned.

“In the meantime in the manner hereinafter provided” refers to the next section. No Rules of Court have yet* been made, altering the distribution of business among the five Divisions of the High Court contained in that section.

“Orders of Transfer.” See s. 36, *infra*, and Order LI., Rules 1, 2 and 3 of the Supreme Court.

As to marking the cause or matter with “the name of the Division,” see section 11 of the Act of 1875.

As to marking the cause or matter with “the name of Judge” in the Chancery Division, see section 42, *infra*.

In all the forms given in the Appendix to the Amending Act, a space is left for the name of the Division; in the Chancery forms for that of the Judge, also.

The writ must (Order II., Rule 1) specify the Division “to which it is intended that any action should be assigned.”

SECTION 34.—*Assignment of certain business to particular Divisions of High Court subject to Rules.*

There shall be assigned (subject as aforesaid) to the Chancery Division of the said Court :

- (1.) All causes and matters pending in the Court of Chancery at the commencement of this Act :
- (2.) All causes and matters to be commenced after the commencement of this Act, under

any Act of Parliament by which exclusive jurisdiction, in respect to such causes or matters, has been given to the Court of Chancery, or to any Judges or Judge thereof respectively, except appeals from County Courts : Act 1873,
s. 34.

(3.) All causes and matters for any of the following purposes :

The administration of the estates of deceased persons ;

The dissolution of partnerships or the taking of partnership or other accounts ;

The redemption or foreclosure of mortgages ;

The raising of portions, or other charges on land ;

The sale and distribution of the proceeds of property subject to any lien or charge ;

The execution of trusts, charitable or private ;

The rectification, or setting aside, or cancellation of deeds or other written instruments ; *

The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases ;

* See, however, *Mostyn v. The West Mostyn Coal and Iron Company*, L. P. D., 145.

Act 1873,
s. 34.

The partition or sale of real estates ;
The wardship of infants and the care of
infants' estates.

There shall be assigned (subject as aforesaid) to
the Queen's Bench Division of the said Court :

- (1.) All causes and matters, civil and criminal,
pending in the Court of Queen's Bench at
the commencement of this Act :
- (2.) All causes and matters, civil and criminal,
which would have been within the ex-
clusive cognizance of the Court of Queen's
Bench in the exercise of its original juris-
diction, if this Act had not passed.

There shall be assigned (subject as aforesaid) to
the Common Pleas Divisions of the said Court :

- (1.) All causes and matters pending in the
Court of Common Pleas at Westminster,
the Court of Common Pleas at Lancaster,
and the Court of Pleas at Durham, respec-
tively, at the commencement of this Act:
- (2.) All causes and matters which would have
been within the exclusive cognizance of
the Court of Common Pleas at West-
minster, if this Act had not passed.

There shall be assigned (subject as aforesaid) to
the Exchequer Division of the said Court :

- (1.) All causes and matters pending in the
Court of Exchequer at the commencement
of this Act :
- (2.) All causes and matters which would have

been within the exclusive cognizance of the Court of Exchequer, either as a Court of Revenue or as a Common Law Court, if this Act had not passed :

Act 1873,
s. 34.

- (3.) *All matters pending in the London Court of Bankruptcy at the commencement of this Act :*
- (4.) *All matters to be commenced after the commencement of this Act under any Act of Parliament by which the exclusive jurisdiction in respect to such matters has been given to the London Court of Bankruptcy.*

There shall be assigned (subject as aforesaid) to the Probate, Divorce, and Admiralty Division of the said High Court :

- (1.) All causes and matters pending in the Court of Probate, or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, at the commencement of this Act :
- (2.) All causes and matters which would have been within the exclusive cognizance of the Court of Probate, or the Court for Divorce and Matrimonial Causes, or of the High Court of Admiralty, if this Act had not passed.*

Section 33 of the Supreme Court of Judicature Act, 1875, and the second Schedule to that Act, repeal from "all matters pending in the London Court of Bankruptcy" to "London Court of Bankruptcy" in this section.

The substituted provisions will be found in section 9 of the Amending Act.

The present section is founded on the following passage in the First Report of the Judicature Commission :—†

"Between the several Chambers or Divisions of the Supreme Court it would be necessary to make such a

* See s. 11 of the Amending Act, and Order V., Rule 4, *infra*. † P. 9.

Act 1873,
s. 24.

classification of business as might seem desirable with reference to the nature of the suits and the relief to be sought or administered therein, and the ordinary distribution of business among the different Chambers or Divisions should be regulated according to such classification. For the same reason which induces us to recommend the retention *for the present* of the distinctive titles of the different Courts in their new character as so many Divisions of the Supreme Court, we think that such classification should in *the first instance* be made on the principle of assigning, as nearly as practicable, to those Chambers or Divisions such suits as would *now* be commenced in the respective Courts as *at present* constituted; with power, however, to the Supreme Court to vary or alter this classification in such manner as may from time to time be deemed expedient."

Forms of the general endorsements of writs in matters assigned by this Act to the Chancery Division will be found in App. (A) to the Amending Act, Part 2, s. 1 §§ 1-9.

Jessel, M.R., has attributed the block in the Chancery Division to Common Law actions being assigned to it.*

See, as to proceeding in default of appearance in actions assigned by this section to the Chancery Division and Probate Actions, Order XIII., Rule 9, of the Supreme Court.

As to the administration of the assets of insolvents dying after the commencement of the Supreme Court of Judicature Acts, see section 10 of the Amending Act.

"Specific performance." That both parties consent is not a sufficient reason for transferring an action. An application to transfer to the Chancery Division an action by an auctioneer to recover from the vendor, to whom the plaintiff had handed it over, the deposit by an intending purchaser on a sale of land which had not been completed owing to an alleged defect of title, was refused by Archibald, J., at chambers, although the defendant had commenced an action for specific performance of the contract of sale in the Chancery Division. "I do not see," said his lordship, "that the claim in this action is mixed up with the claim for specific performance."†

* *Times*, January 31st, 1877.

† 2 Charley's Cases (Chambers), 8. See also, as to specific performance, *Hyde v. Warden*, *Times*, Dec. 21st and 22nd, 1876; *Hillman v. Mayhew*, 1 Ex. D., 132.

"Infants." See the note to subs. (10) of s. 25, *supra*.

"The partition or sale of real estates." See the Partition Acts, 1868 and 1876.*

Act 1873,
s. 34.

The control over separate estates is not mentioned among the matters assigned to the Chancery Division, but where the defendant, a married woman, was sued on her guarantee, the action was transferred by Lindley, J., at chambers, to the Chancery Division, for the purpose of charging her separate estate. (Leave had been previously obtained to amend the indorsement on the writ, so as to charge her separate estate.)†

"The Queen's Bench Division." See *Re Ellershaw*.‡

"The Common Pleas Division." The proper Division in which to move pursuant to leave reserved at the trial of an action brought in the Court of Common Pleas at Lancaster, is not the Exchequer Division, but the Common Pleas Division of the High Court of Justice. §

SECTION 35.—*Option for any Plaintiff subject to Rules to choose in what Division he will sue.*

Subject to any Rules of Court, and to the provisions hereinbefore contained, and to the power of transfer, every person by whom any cause or matter may be commenced in the said High Court of Justice shall assign such cause or matter to one of the Divisions of the said High Court, not being the Probate, Divorce and Admiralty Division thereof, as he may think fit, by marking the document by which the same is commenced, with the name of such Division, and giving notice thereof to the proper officer of the Court; provided that all interlocutory and other steps and proceedings in or before the said High Court, in any cause or matter subsequent to the commencement thereof, shall be taken (subject to any Rules of Court and to the power of transfer) in the Division of the said High Court to which such cause or matter is for the time being attached; provided also, that if any plaintiff or petitioner shall at any time assign his cause or matter to any Division of the said High Court to which, according to the Rules of Court or the provisions of this Act, the same ought not to be assigned, the Court, or any Judge of such Division, upon being informed thereof, may, on a summary application, at any stage of the cause or matter, direct the same to be transferred to the Division of the said Court to

* A full examination of these Acts will be found in Charley's Real Property Acts, 3rd edition, pp. 353-71. London: H. Sweet, 3, Chancery Lane.

† 2 Charley's Cases (Chambers), 7.

‡ 1 Q. B. D., 481.

§ *Saunders v. Stuart*, *Times*, November 5th and 9th, 1876; 1 Charley's Cases (Court), 42, 44

Act 1873,
s. 35.

which, according to such rules or provisions, the same ought to have been assigned, or he may, if he think it expedient so to do, retain the same in the Division in which the same was commenced; and all steps and proceedings whatsoever taken by the plaintiff or petitioner, or by any other party in any such cause or matter, and all orders made therein by the Court or any Judge thereof before any such transfer, shall be valid and effectual to all intents and purposes in the same manner as if the same respectively had been taken and made in the proper Division of the said Court to which such cause or matter ought to have been assigned.

This section is repealed by the Supreme Court of Judicature Act, 1875, s. 33, and the second Schedule.

The substituted provisions will be found in section 11 of the Supreme Court of Judicature Act, 1875.* That section, however, re-enacts the present section *verbatim*, adding, at the end merely, the following additional proviso:—

“Subject to Rules of Court, a person commencing any cause or matter shall not assign the same to the Probate, Divorce, or Admiralty Division, unless he would have been entitled to commence the same in the Court of Probate or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, if this Act had not been passed.”

SECTION 36.—*Power of Transfer.*

Any cause or matter may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by such authority and in such manner as Rules of Court may direct, from one Division or Judge of the High Court of Justice to any other Division or Judge thereof, or may by the like authority be retained in the Division in which the same was commenced, although such may not be the proper Division to which the same cause or matter ought, in the first instance, to have been assigned.

* See, also, Order V., Rule 4, of the Supreme Court.

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This section is founded on the following passage in the First Report of the Judicature Commission :—*

Act 1873,
s. 36.

“It should, further, be competent for any Chamber or Division of the Supreme Court to order a suit to be transferred at any stage of its progress to any other Chamber or Division of the Court, if it appears that justice can thereby be more conveniently done in the suit : but, except for the purpose of obtaining such transfer, it should not be competent for any party to object to the prosecution of any suit in the particular Chamber or Division in which it is being prosecuted, on the ground that it ought to have been brought or prosecuted in some other Chamber or Division of the Court. When such transfer has been made, the Chamber or Division, to which the suit has been so transferred, will take up the suit at the stage to which it had advanced in the first Chamber, and proceed thenceforward to dispose of it in the same manner as if it had been originally commenced in the Chamber or Division to which it was transferred.”

The “power of transfer” and “order of transfer” have been already incidentally alluded to, ss. 29 and 33, *supra*.

By Order LI., Rule 1, of the first Schedule to the Supreme Court of Judicature Act, 1875, “any action or actions may be transferred from one Division to another of the High Court or from one Judge to another of the Chancery Division by an order of the Lord Chancellor, provided that no transfer shall be made from or to any Division without the consent of the President of the Division.” By Rule 2 of the same Order, “any action may, at any stage, be transferred from one Division to another by an order made by the Court or any Judge of the Division to which the action is assigned : Provided that no such transfer shall be made without the consent of the President of the Division to which the action is proposed to be transferred.”

See also section 11 of the Supreme Court of Judicature Act, 1875, subsection (2), and section 39 of this Act, *infra*, and the cases cited under them.

Where an administration suit had been commenced in the Chancery Division, an action in the Queen’s Bench Division by the widow of the testator against a trustee of the

Act 1873,
s. 36.

will, to recover shares which were alleged to form part of the testator's property, was transferred to the Chancery Division.*

Where an administration suit had been commenced in the Chancery Division, an action in the Queen's Bench Division by a creditor of the testator, on a promissory note of the testator, against his executors, was transferred to the Chancery Division.†

Where an action was brought against the surviving partner and the executor of a deceased partner of a firm of builders, and the surviving partner had absconded, the Judge at Nisi Prius transferred the action to the Chancery Division, as being, in substance, an administration suit.‡

Where an action for breach of an agreement was commenced in the Exchequer Division on the 29th of March, 1876, and the statement of defence was delivered on the 27th of May, 1876, and issue was joined and the case set down for trial, the action was, on the 21st of November, 1876, on appeal from chambers, transferred to the Chancery Division, because, on the 15th of May, 1876, the defendant had commenced a cross-suit in the Chancery Division for specific performance of the agreement.§

Lindley, J., at chambers, made an order to transfer to the Master of the Rolls an action in a Common Law Division, by a mortgagee to be let into possession.||

On the other hand, where A B commenced a Chancery suit against C D, to set aside a contract for the sale of a mine, on the ground of fraud, and E F and G H, C D's solicitors, brought an action against A B in the Queen's Bench Division on one of the bills of exchange which A B had given to C D in part payment of the contract price, the Queen's Bench Division refused to order the action in that Division to be transferred to the Chancery Division, E F and G H having made an affidavit that

* *Doering v. Labouchere*, *Times*, Tuesday, April 11th, 1876; 2 Charley's Cases (Court), 93.

† *Hannen v. Hannen*, *Times*, Thursday, April 13th, 1876; 2 Charley's Cases (Court), 96.

‡ *Bankart v. Haddon*, *Times*, Saturday, August 5th, 1876; 2 Charley's Cases (Court), 106.

§ *Holmes v. Harvey*, 25 W. R., 80; 35 L. T., 600.

|| *Young v. King*, 1 Charley's Cases (Chambers), 20.

they took the bill from C D, their client, without fraud, four months before the Chancery suit.*

Act 1873,
s. 36.

In an action for money lent, the defendant set up a counterclaim for a partnership account. An application by the defendant to transfer the action to the Chancery Division was refused by Huddleston, B., at chambers, on the ground that the counterclaim merely alleged an agreement between the plaintiff and the defendant to share the profits of a publication which the defendant had illustrated, and did not involve any dealing with complicated partnership accounts. It was unnecessary to go through "the cumbersome form" of a suit in Chancery. The Judge ordered a reference to the Master.†

An action in the Exchequer Division, ostensibly founded on contract, but likely to prove an action of salvage, having been transferred to the Admiralty Division by a Judge at chambers, the Court refused to re-transfer it to the Exchequer Division.‡

Where, in an action against a tenant to recover rent at the rate of £40 a year, the defendant denied that there was any agreement as to the amount of rent, and that £30 a year was as much as was reasonable, and also set up a counterclaim, praying that the land should be partitioned between himself and the plaintiff, Lindley, J., at chambers, adjourned an application on behalf of the defendant to have the action transferred to the Chancery Division, till after the decision of the question of fact as to the amount of the rent by a jury at the Assizes, the Queen's Bench Division, on appeal from Lindley, J., refused to interfere with his decision.§

A Judge of the Queen's Bench, sitting at chambers, has no power to transfer an action from the Exchequer to the Common Pleas Division. The application must be made to the Exchequer Division (per Lush, J.)|| But he may transfer an action from the Exchequer to the Chancery Division.¶

* *Coads v. Harrison*, *Times*, Wednesday, April 12th, 1876; 2 Charley's Cases (Court), 101. + *Warne v. Dell*, 1 Charley's Cases (Chambers), 19.

† *Nelson v. The Singapore Steamship Company*, *Times*, Tuesday, March 20th, 1876; 2 Charley's Cases (Court), 88.

‡ *Helton v. Fletcher*, *Times*, Tuesday, December 5th, 1876.

|| 1 Charley's Cases (Chambers), 18 (*sed quare*). See Order LI., Rule 2, *infra*.

¶ *Hillman v. Mayhew*, 1 Ex. D., 132.

Act 1873,
s. 37

SECTION 37.—*Sittings in London and Middlesex and on Circuits.*

Subject to any arrangements which may be from time to time made by mutual agreement between the Judges of the said High Court, the sittings for trials by jury in London and Middlesex, and the sittings of Judges of the said High Court under Commissions of Assize, Oyer and Terminer, and Gaol Delivery, shall be held by or before Judges of the Queen's Bench, Common Pleas, or Exchequer Division of the said High Court: Provided that it shall be lawful for Her Majesty, if she shall think fit, to include in any such Commission any Ordinary Judge of the Court of Appeal or any Judge of the Chancery Division to be appointed after the commencement of this Act, or any Serjeant-at-Law, or any of Her Majesty's Counsel learned in the law, who, for the purposes of such Commission, shall have all the power, authority, and jurisdiction of a Judge of the said High Court.

See sections 11, 16, 29, and 30, and the notes thereto, *supra*. Also see section 93, *infra*, section 23 of the Act of 1875, and the Order in Council of February 5, 1876, under it.

The present section is amended by the 8th section of the Supreme Court of Judicature Act, 1875, which enacts, that "every Judge of the Probate, Divorce and Admiralty Division of the High Court of Justice, appointed after the passing of" that "Act, shall, so far as the state of business in the said Division will admit, share with the Judges mentioned in section 37 of the Principal Act the duty of holding sittings for trials by jury in London and Middlesex; and

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sittings under Commissions of Assize, Oyer and General Gaol Delivery."

Act 1873,
s. 37.

By section 15 of the Appellate Jurisdiction Act, 1876, the three new Ordinary Judges of the Court of Appeal appointed under that Act will be "under an obligation to go circuits."

A Chancery Judge sitting on a Commission of Oyer and Terminer and General Gaol Delivery, as contemplated by this section, would afford as striking an illustration of the union of the Superior Courts as could well be conceived.* There is no principle better established than that the Chancery Judges have no criminal jurisdiction.

Reference may be made to the second Appendix to the Fifth (and Final) Report of the Judicature Commission (1874) for interesting information respecting the subject-matter of this section, including the Royal Warrants for adding Serjeants-at-Law and Queen's Counsel, &c., to the various Commissions of Assize.

See also the 13 & 14 Vict. c. 25.

SECTION 38.—*Rota of Judges for Election Petitions.*

The Judges to be placed on the rota for the trial of election petitions for England in each year, under the provisions of the "Parliamentary Elections Act, 1868," shall be selected out of the Judges of the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice in such manner as may be provided by any Rules of Court to be made for that purpose; and in the meantime, and subject thereto, shall be selected out of the Judges of the said Queen's Bench, Common Pleas, and Exchequer Divisions of the said High Court, by the Judges of such

* This has been virtually carried out by the appointment of Lindley, J., to be a Commissioner of Oyer and Terminer and General Gaol Delivery.

Act 1873,
s. 38.

Divisions respectively, as if such Divisions had been named instead of the Courts of Queen's Bench, Common Pleas, and Exchequer respectively in such last-mentioned Act: Provided that the Judges who, at the commencement of this Act, shall be upon the rota for the trial of such petitions during the then current year, shall continue upon such rota until the end of such year, in the same manner as if this Act had not passed.

This is one of the transition clauses of this Act.

The Act 31 and 32 Vic. c. 125, and the General Rules of Procedure, made under s. 25 of that Act by the Election Judges, will be found in the Appendix to Hardcastle on the Law and Practice of Election Petitions (1874).

The "rota" for each year is to be settled "on the third day of Michaelmas Term." By Rule 1 of Order LXI. of the Rules of the Supreme Court "The Michaelmas sittings shall commence on the 2nd November," i.e., the first day of the old Michaelmas Term. The Chiefs of the three Common Law Divisions and Judges who are members of the House of Lords* are excluded from the rota. Each of the three Common Law Divisions nominates a Puisne Judge to be placed upon the rota, the Chief of the Division having a second or casting vote, in case the Court is divided.

SECTION 39.—*Powers of one or more Judges not constituting a Divisional Court.*

Any Judge of the said High Court of Justice may, subject to any Rules of Court, exercise in Court or in Chambers all or any part of the jurisdiction by this Act vested in the said High Court, in all such causes and matters, and in all such

* Lord Coleridge is the only Judge of a Common Law Division who is a member of the House of Lords, and he is not a Puisne Judge.

proceedings in any causes or matters, as before the passing of this Act might have been heard in Court or in Chambers respectively, by a single Judge of any of the Courts whose jurisdiction is hereby transferred to the said High Court, or as may be directed or authorised to be so heard by any Rules of Court to be hereafter made. In all such cases, any Judge sitting in Court shall be deemed to constitute a Court.

This is, to some extent, one of the transition clauses of the Act. One effect of it is that in the Chancery Division, and in the Probate, Divorce, and Admiralty Division, the business will be, as it always was in the Courts which they represent, conducted before a single Judge. The words "or as may be directed or authorised to be so heard by any Rules of Court to be hereafter made," afford a loophole for considerable economy of Judge power. They receive a new force from section 17 of the Appellate Jurisdiction Act, 1876, which enacts that, "so far as is practicable and convenient," "ALL business arising out of EVERY proceeding in the High Court shall be heard, determined, and disposed of before a single Judge." The words above referred to in this section are founded on the following passage in the First Report of the Judicature Commission :—*

"With a Court of Appeal such as we propose to recommend, common to all the Divisions of the Supreme Court, constantly sitting, and easy of access, we think that matters of great importance may properly, as now in the Court of Chancery, be intrusted to the jurisdiction in the first instance of a single Judge; but, having regard to the principles which have guided us in our previous recommendations, and to the importance of avoiding any too violent transition from the modes of conducting judicial business to which the public have been accustomed, and in which they may be presumed to place confidence, we think it will be advisable to authorise a single Judge to exercise

* P. 10 of their First Report.

Act 1873,
s. 39.

the jurisdiction of the Supreme Court, in the despatch of all such business appropriated to the Divisions of the Queen's Bench, Common Pleas, and Exchequer respectively, as by general orders, or by the special order of the Court, or the consent of the parties, may be remitted to him."

As this is the first section which deals with the *number* of Judges competent to form a "Court," it may not be out of place to cite here the short epitome of the question, as it then stood, given by the Judicature Commission:—*

"Here arises an important and difficult question, as to the number of Judges who should ordinarily sit in each Chamber or Division of the Supreme Court. Hitherto the constitution of the Court of Chancery and of the Courts of Common Law, in this respect, has been entirely different. Each Division of the Court of Chancery is presided over by a single Judge, who adjudicates on all matters as a Court of First Instance, except in the few cases when he sits as a Court of Appeal from the County Courts. In like manner, a single Judge administers justice in the Courts of Probate, Divorce, and Admiralty respectively. On the other hand, in the Sittings of the Courts of Common Law *in banco*, the Court is ordinarily constituted of four Judges. The matters adjudicated upon by the single Judge in the Court of Chancery are in many instances as important as the business transacted before the four Judges in the Courts of Common Law; so that there would seem to be either a want of power in the Court of Chancery, or an excess of power in the Courts of Common Law; but it must be borne in mind that a considerable proportion of the business of the Courts of Common Law is transacted by one of the Judges sitting at chambers; much of the business of these Courts also consists of the review of trials which have taken place before a Judge and Jury; they also review the decisions of the Judge sitting at chambers; they are also empowered to decide various important matters, some of which involve questions of general public interest, on which their determination is in some cases final."

Mr. Justice Lush, in his "Practice of the Superior Courts of Law,"† defines in very wide terms the jurisdiction

* P. 10 of the First Report.

† Book II. c. XVII.

of a Judge at chambers. "The Common Law," he says, "appears to vest in a single Judge the same equitable jurisdiction over the proceedings of a cause, which it vests in the Court of which he is a constituent member. His act is potentially the act of the Court, for although he cannot directly enforce the orders he makes, or exercise what may be termed the prerogative powers of the Court, yet the Court will adopt his orders, and for disobedience thereto, when so adopted, will issue process of attachment, as if the matter had been originally ordered by the Court itself."*

Act 1873,
s. 39.

Two remarkable statutes, 11 Geo. IV. and 1 William IV. c. 70,† and 1 and 2 Vict. c. 45,‡ seem to have forestalled, to some extent, the spirit of the proviso contained in the next section:—"Every Judge of the High Court shall be qualified and empowered to sit in any such Divisional Courts." By virtue of these enactments, "it may," says Mr. Justice Lush, "be laid down, that, of whichever Court a Judge of either of the Superior Courts [of Common Law] is Judge, he possesses the same jurisdiction as he would have had if he were a Judge of the Court to which the matter in question belongs; so that for the purpose of transacting *anywhere out of Court* all such business, as by the course and practice of the Court to which such business belongs, may be transacted by a single Judge, every Judge of the Superior Courts of Common Law may be said to *represent all the three Courts*."

Where an Act gives new powers to one of the Superior Courts of Common Law in general terms, these powers may be exercised by a Judge at Chambers,§ unless they are in express terms confined to "the Court" alone.¶

It is competent for the Superior Courts of Common Law to grant a rule *nisi* returnable to chambers, with respect to such matters as belong to them by Common Law.¶ It is now clearly established that a Judge at chambers has

* See *Rex v. Falkner*, 2 O. M. and R., 525.

† S. 4.

‡ S. 1.

§ *Smeston v. Collier*, 1 Ex., 457.

¶ See, e.g., *Jones v. Fitzaddam*, 1 O. & M., 855.

¶ *Cases v. Wright*, 14 O. B., 562.

Act 1873,
s. 89.

the same power to award costs as the Court would have had in the same case.*

Any Judge of the Queen's Bench, Common Pleas, or Exchequer Divisions of the High Court of Justice, sitting at chambers, has power (with the consent of the Lord Chancellor) to transfer an action from the Queen's Bench, Common Pleas, or Exchequer Divisions, to the Chancery Division, although he is not a Judge of the Division from which the action is transferred.†

This was so decided by Mr. Baron Huddleston, on the ground that the 11 Geo. IV. c. 70, s. 4, and 1 and 2 Vict. c. 45, s. 1, conferred the jurisdiction, and the Supreme Court of Judicature Acts did not take it away; and it was so decided by Mr. Baron Amphlett, on the ground that, independently of the 11 Geo. IV. c. 70, s. 4, and 1 and 2 Vict. c. 45, s. 1, the Supreme Court of Judicature Acts conferred the jurisdiction. He relied more particularly on the words in brackets at the commencement of section 31 of the present Act ("but not so as to prevent any Judge from sitting, whenever required, for any Judge of a different Division from his own"); on Order LIV., Rule 2, which excepts from the jurisdiction of a *Master only* the transfer of actions from one Division to another; and on the present section, read in connection with Order LI., Rule 2, of the Rules of the Supreme Court.

SECTION 40.—*Divisional Courts of the High Court of Justice.*

Such causes and matters as are not *proper* to be heard by a single Judge shall be heard by Divisional Courts of the said High Court of Justice, which shall for that purpose exercise all or any part of the jurisdiction of the said High Court. Any number of such Divisional Courts

* *Bridge v. Wright*, 2 Ad. & El., 48; *Hughes v. Brand*, 2 D. P. C., 131; *Clement v. Weaver*, 3 M. & G., 551.

† *Hillman v. Mayhew*, 1 Ex. D., 132; 45 L. J. (Ex.), 334; 2 Charley's Cases (Court), 107.

may sit at the same time, A Divisional Court of the said High Court of Justice shall be constituted by two or three, and no more of the Judges thereof; and, except when through pressure of business or any other cause it may not conveniently be found practicable, shall be composed of three such Judges. Every Judge of the said High Court shall be qualified and empowered to sit in any of such Divisional Courts. The President of every such Divisional Court of the High Court of Justice shall be the senior Judge of those present, according to the order of their precedence under this Act.*

Act 1873,
s. 40.

So much of this section as is *inconsistent* with section 17 of the Appellate Jurisdiction Act, 1876, is repealed as from the 1st of December, 1876, by that enactment.

"As are not *proper* to be heard." For this must now be read, "as it is not practicable and convenient should be heard." The Judicature Commissioners, in their first Report, suggested that "all matters now disposed of *in banco* by the Courts of Queen's Bench, Common Pleas, and Exchequer, shall be heard and determined by not more than three Judges." The language of the 17th section of the Appellate Jurisdiction Act is "*two* and no more." For "shall be composed of *three*" should now be read "shall be composed of *two*." The Chief and a majority of any Division may, however, form the Divisional Court of two or more Judges.

The expression, "Divisional Court," used in these and several other sections of the Act, is not a particularly happy one. Confusion is apt to arise in the mind of the reader between *the Divisions* of the High Court of Justice and *the Divisional Courts* of the High Courts of Justice; but they are quite distinct. The Divisions of the High Court of Justice, five in number, have already been defined

* As to the "order of precedence," see sect. 6 of the Act of 1875.

Act 1873,
s. 40.

by sect. 31, *supra*. They are, to all intents and purposes, permanent, and so are their members, and are severally endowed with certain wholly distinct functions. The Divisional Courts of the High Court are formed of any accidental combination of Judges, irrespective of the Divisions to which they belong, and are as changeable as the forms and colours in a kaleidoscope. The invention of Divisional Courts has given remarkable elasticity to our new system of judicature.

A further confusion of thought arises, however, from the fact that the present section speaks of "Divisional Courts of the High Court of Justice" generally; s. 41 speaks of "Divisional Courts for the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court;" s. 43 speaks of "Divisional Courts of the Chancery Division;" and s. 16 of the Appellate Judicature Act, 1876, speaks of "Divisional Courts of the Court of Appeal." The distinction between a Divisional Court of the High Court generally and a Divisional Court for the Queen's Bench, Common Pleas, and Exchequer Divisions appears to be that the latter must "as far as may be found practicable or convenient," "include one or more Judge or Judges attached to the particular division to which the cause or matter has been assigned" (s. 41). There is no such restriction as the formation of Divisional Courts for the Chancery Division (s. 43) or for the Probate, Divorce, and Admiralty Division (s. 44). Of course, the Divisional Courts of the Court of Appeal must necessarily consist only of *ex-officio*, ordinary, or additional members of that Court, just as the Divisional Courts of the High Court can only consist of members of the High Court.*

By Order LVIIA. (Rules of the Supreme Court, December, 1876), the following proceedings and matters shall continue to be heard and determined before the Divisional Courts:—

"Proceedings on the Crown side of the Queen's Bench Division.

"Appeals from Revising Barristers, and proceedings

* Ordinary Judges of the Court of Appeal may sit in a Divisional Court of the High Court, under s. 51, *infra*.

relating to Election Petitions, Parliamentary and Municipal.

Act 1873,
s. 40.

“Appeals under section 6 of the County Courts Act, 1875.

“Proceedings on the Revenue side of the Exchequer Division.

“Proceedings directed by any Act of Parliament to be taken before the Court, and in which the decision of the Court is final.

“Cases stated by the Railway Commissioners under the 36 & 37 Vict. c. 48.

“Cases of Habeas Corpus, in which a Judge directs that a rule *nisi* for the writ, or the writ be made returnable before a Divisional Court.

“Special cases where all parties agree that the same be heard before a Divisional Court.

“Appeals from Chambers in the Queen’s Bench, Common Pleas, and Exchequer Divisions, and applications for new trials in the said Division (*sic*) where the action has been tried with a jury.”*

It will be perceived that no mention is made in this list of those motions for judgment, which, by the express provisions of Rule 6 of Order XL. of the Rules of the Supreme Court must be made to a Divisional Court. The reason is that the motions, in these cases, must now be made to the Court of Appeal. By the 7th of the Rules of the Supreme Court, December, 1876, “Order XL., Rules 4 and 6 are repealed, and Rule 5 is repealed so far as it affects trials before a Judge; and the following Rule is substituted for Rule 4:—

“Where, at or after the trial of an action by a Jury, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the Judge having caused the finding to be wrongly entered with reference to the finding of the Jury upon the question or questions submitted to them.

* Where the trial has been by a Judge, without a Jury, the application for a new trial is to be to the Court of Appeal. (Order XXXIX., Rule 1, December, 1876.)

Act 1873,
s. 40.

“Where, at or after the trial of an action before a Judge, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong.

“An application under this Rule shall be to the Court of Appeal.”

Mr. Finlason, in his recent work on “Our New Judicial System,” says that “Divisional Courts under the Judicature Acts become virtually Courts of Appeal.”*

SECTION 41.—*Divisional Courts for business of Queen's Bench, Common Pleas, and Exchequer Divisions.*

Subject to any Rules of Court, and in the meantime until such Rules shall be made, *all* business belonging to the Queen's Bench, Common Pleas, and Exchequer Divisions respectively of the said High Court, *which, according to the practice now existing in the Superior Courts of Common Law, would have been proper to be transacted or disposed of by the Court sitting in banco if this Act had not passed,* may be transacted and disposed of by Divisional Courts, which shall as far as may be found practicable and convenient, include one or more Judge or Judges attached to the particular Division of the said Court to which the cause or matter out of which such business arises has been assigned; and it shall be the duty of every Judge of such last-mentioned Division and also of every other Judge of the High Court who shall not for the time being be occupied in the transaction of any business specially assigned

to him, or in the business of any other Divisional Court, to take part, if required, in the sittings of such Divisional Courts as may from time to time be necessary for the transaction of the business assigned to the said Queen's Bench, Common Pleas, and Exchequer Divisions respectively; and all such arrangements as may be necessary or proper for that purpose, or for constituting or holding any Divisional Courts of the said High Court of Justice for any other purpose authorised by this Act, and also for the proper transaction of that part of the business of the said Queen's Bench, Common Pleas, and Exchequer Divisions respectively, which ought to be transacted by one or more Judges not sitting in a Divisional Court, shall be made from time to time under the direction and superintendence of the Judges of the said High Court; and in case of difference among them, in such manner as a majority of the said Judges, with the concurrence of the Lord Chief Justice of England, shall determine.

Act 1872,
c. 41.

So much of this section as is *inconsistent* with the provisions of section 17 of the Appellate Jurisdiction Act, 1876, is repealed, as from the 1st of December, 1876, by that enactment. All business which would have been proper to be disposed of by the Court *in banco*, will not now be disposed of by Divisional Courts.

The present section is designed to carry out the following recommendation of the Judicature Commission :*—"We also think that the Judges of each Division or Chamber in which there are several Judges should have power to sit *in banco* in two sub-divisions at the same time, with the

* P. 10 of their First Report.

Act 1873,
s. 41.

assistance, whenever necessary, of a Judge or Judges from any other Division of the Court." The scheme contained in the present section appears to be a more elastic one than that suggested by the Judicature Commission in the above paragraph.

By the 33 Vict. c. 6, any of the Judges of the Superior Courts of Common Law at Westminster was qualified to sit in any other of these Courts at the request of its Chief, and any of these Courts might sit in two Divisions.

Mr. Finlason, in his recent work on "Our New Judicial System,"* says that "Divisional Courts practically are confined to the Common Law Divisions."

SECTION 42.—*Distribution of business among the Judges of the Chancery and Probate, Divorce, and Admiralty Divisions of the High Court.*

Subject to any Rules of Court, and in the meantime until such Rules shall be made, all business arising out of any cause or matter assigned to the Chancery or Probate, Divorce, and Admiralty Divisions of the said High Court, shall be transacted and disposed of in the first instance by one Judge only, as has been heretofore accustomed in the Court of Chancery, the Court of Probate and for Divorce and Matrimonial Causes, and the High Court of Admiralty respectively; and every cause or matter which, at the commencement of this Act, may be depending in the Court of Chancery, the Court of Probate and for Divorce and Matrimonial Causes, and the High Court of Admiralty respectively, shall (subject to the power of transfer) be assigned to the same Judge in or to whose Court the same

may have been depending or attached at the commencement of this Act; and every cause or matter which after the commencement of this Act may be commenced in the Chancery Division of the said High Court, shall be assigned to one of the Judges thereof, by marking the same with the name of such of the said Judges as the plaintiff or petitioner (subject to the power of transfer) may in his option think fit: Provided that (subject to any Rules of Court, and to the power of transfer, and to the provisions of this Act as to trial of questions or issues by Commissioners, or in Middlesex or London) all causes and matters which, if this Act had not passed, would have been within the exclusive cognizance of the High Court of Admiralty, shall be assigned to the present Judge of the said Admiralty Court during his continuance in office as a judge of the High Court.

This section, so far as it is *inconsistent* with section 17 of the Appellate Jurisdiction Act, 1876, is repealed, as from the 1st of December, 1876, by that enactment. It is difficult to see why this section was included in the partial repeal enacted by section 17 of the Appellate Jurisdiction Act, 1876, as it is entirely in accordance with the principle of single-Judge judicature.

This is one of the transition clauses of this Act.

See the next section and s. 44 as to the holding of Divisional Courts for the transaction of Chancery, Admiralty, Probate, and Divorce business.

As to the "power of transfer," see s. 36, *supra*.

As to "the provision of this Act as to trial of questions or issues by Commissioners, or in Middlesex or London," see sections 29 and 30, *supra*, and the notes appended thereto.

Act 1873,
s. 42.

As to "causes and matters in the Court of Admiralty, see s. 34 of this Act, *supra*, section 11 of the Act of 1875, and Order V., Rule 4, of the Rules of the Supreme Court. As to "the present Judge of the Court of Admiralty," and the provisions for his "continuance in office," see s. 8 of the Act of 1875. His jurisdiction is expressly preserved by this section; and is not taken away by sec. 45, *infra*.*

SECTION 43.—*Divisional Courts for business of the Chancery Division.*

Divisional Courts may be held for the transaction of *any part of the* business assigned to the said Chancery Division, *which the Judge, to whom such business is assigned, with the concurrence of the President of the same Division, deems proper to be heard by a Divisional Court.*

By section 17 of the Appellate Jurisdiction Act, 1876, this section is repealed, so far as it is inconsistent with the provisions of that enactment. This involves the absolute repeal of the concluding words of the section printed in italics, as Divisional Courts can now only be "held for the transaction of any business which may for the time being be ordered by Rules of Court to be heard by a Divisional Court."

By the preceding section all business in the Chancery Division is to be assigned in the first instance to a single Judge. The Lord Chancellor is (sect. 31) "the President" of the Chancery Division of the High Court.

SECTION 44.—*Divisional Courts for business belonging to the—(sic)—Division.*

Divisional Courts may be held for the transaction of any part of the business assigned to the Probate, Divorce, and Admiralty Divisions of the said High Court, *which the Judges of such Division, with*

* The *Two Brothers*, 1 P. D., 52; 1 Charley's Cases (Court), 45.

the concurrence of the President of the said High Court, deem proper to be heard by a Divisional Court.

Act 1873,
s. 44.

Any cause or matter assigned to the said Probate, Divorce, and Admiralty Division may be heard at the request of the President of such Division, with the concurrence of the President of the said High Court, by any other Judge of the said High Court.

By section 17 of the Appellate Jurisdiction Act, 1876, this section, so far as it is inconsistent with that enactment, is, as from the 1st of December, 1876, repealed by it. The words printed in italics must evidently be expunged, as the decision as to what is "proper to be heard by a Divisional Court," is now defined, not by "the Judges of the Division with the concurrence of the President of the High Court," but by "Rules of Court."

"A single Judge administers justice in the Courts of Probate, Divorce, and Admiralty respectively." First Report of the Judicature Commission, p. 10.

By s. 31, "the existing Judge of the Court of Probate shall be the President of the Probate, Divorce, and Admiralty Division (unless appointed an Ordinary Judge of the Court of Appeal), and subject thereto, the senior Judge of the said Division, according to the order of precedence under this Act, shall be President."

The "President of the High Court" is, presumably, the Lord Chancellor, but by s. 3 of the Supreme Court of Judicature Act, 1875, it is stated that "the Lord Chancellor shall not be deemed a permanent Judge of the High Court." "In the absence of the Lord Chancellor, the Lord Chief Justice of England" is (sect. 5) to be "the President" of the High Court.

SECTION 45.—*Appeals from Inferior Courts to be determined by Divisional Courts.*

All appeals from Petty or Quarter Sessions, from a County Court, or from any other Inferior

Act 1873,
c. 45.

Court, which might before the passing of this Act have been brought to any Court or Judge whose jurisdiction is by this Act transferred to the High Court of Justice, may be heard and determined by Divisional Courts of the said High Court of Justice, consisting respectively of such of the Judges thereof as may from time to time be assigned for that purpose, pursuant to Rules of Court, or (subject to Rules of Court) as may be so assigned according to arrangements made for the purpose by the Judges of the said High Court. The determination of such appeals respectively by such Divisional Courts shall be final, unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an Inferior Court shall have been heard.

By the 20 and 21 Vict. c. 45, an appeal is given from the decision of any information or complaint in a summary way, by any Justice or Justices, alleged to be wrong in point of law, to one of the Superior Courts of Law to be named by the party appealing, and the Justice or Justices may be compelled to state a case.

This appeal, it is apprehended, lies now to the Divisional Court of Appeal from Inferior Courts under this section.

The words of this section are very sweeping, and would seem to include "*all* appeals from *any* Inferior Court which might have been brought to *any* Court or Judge whose jurisdiction is transferred to the High Court." As a matter of fact, however, it will be found that the *exclusive* jurisdiction of the Court of Queen's Bench over inferior tribunals is, for the most part, lodged in the Queen's Bench Division. In other cases, again, the appeal lies, not to the new Divisional Court of Appeal, but to Her Majesty's Court of Appeal. A good illustration of this

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class of cases is found in *Le Blanch v. Reuter's Telegram Company, Limited*, already cited under section 18 of this Act. There an appeal had been brought to the Divisional Court of Appeal from Inferior Courts from a judgment of the Lord Mayor's Court upon a demurrer to pleadings. "Error" upon demurrer, however, must, prior to the commencement of the Supreme Court of Judicature Acts, have been brought (under the 20 and 21 Vict. c. 157) to the Court of Exchequer Chamber; and by section 18 of the present Act all jurisdiction of the Court of Exchequer Chamber is transferred to Her Majesty's Court of Appeal. It follows that, proceedings in error being abolished and appeals substituted for them by Order LVIII. of the Supreme Court, the Court to which an appeal now lies from the Lord Mayor's Court, is not the Divisional Court of Appeal from Inferior Courts, but Her Majesty's Court of Appeal.*

Act 1873,
s. 45.

There is no appeal under the present section from a decision of the Court of Common Pleas on a Registration Appeal from a Revising Barrister.†

The Law stood thus with regard to appeals from County Courts at the commencement of the Supreme Court of Judicature Acts:—

By s. 14 of the statute 13 and 14 Vict. c. 61 and s. 13 of the 30 and 31 Vict. c. 142, an appeal was given in Common Law cases from the County Courts "to any of the Superior Courts of Common Law at Westminster."

By s. 18 of the statute 28 and 29 Vict. c. 99, an appeal was given in Equity cases from the County Courts to a Vice-Chancellor.

By s. 26 of the statute 31 and 32 Vict. c. 71, an appeal was given in Admiralty cases from the County Court to the High Court of Admiralty.

By s. 58 of the statute 20 and 21 Vict. c. 77, an appeal was given from the County Court in testamentary matters to the Court of Probate.

By s. 71 of the statute 32 and 33 Vict. c. 71, an appeal was given from the County Court in Bankruptcy

* *Le Blanch v. Reuter's Telegram Company*, 1 Ex. D., 408; 24 L. T., 691; 2 Charley's Cases (Court), 5.

† *Ainsworth and others, Appellants, v. Hopper, Respondents*, Times, Nov. 17th, 1875; 1 Charley's Cases (Court), 52.

Act 1873,
s. 45.

cases to the Chief Judge in Bankruptcy,* and from him, again, to the Court of Appeal in Chancery.

This brief statement of the diversity of appeal will illustrate the extremely beneficial character of the present enactment in establishing one appellate tribunal for County Courts in the High Court of Justice.

By s. 15 of the Act of 1875, "it shall be lawful for Her Majesty from time to time, by Order in Council, to direct that the enactments relating to appeals from County Courts shall apply to any other Inferior Court of Record."

Shortly after the commencement of the Supreme Court of Judicature Acts (1st November, 1875), much inconvenience was felt by suitors, owing to no steps having been taken under the present section to form a Divisional Court of Appeal from County Courts.

Section 6 of the County Courts Act, 1875 (38 and 39 Vict. c. 50),† requires that the appeal by motion *ex parte* from a County Court must be brought within eight days, and that if the Court of Appeal from Inferior Courts "is not sitting, the motion may be made to a Judge at chambers."

On the 13th of November, 1875, one of the parties in *Eccles v. Eccles*‡ was desirous of appealing from the decision of the County Court Judge. There being no Divisional Court formed under the present section, and as the eight days allowed for appealing would have run out before such a Court could have been formed and the appeal been heard, Vice-Chancellor Malins held that he was, under the circumstances, justified in hearing the appeal in Court instead of at chambers as directed by the County Courts Act, 1875, and reversed the decision of the County Court Judge, unless cause to the contrary should be shown before a Divisional Court of Appeal or before the Vice-Chancellor in a month.

On the 16th November, 1875, Mr. Justice Lush, at chambers, made an order that the defendant, in *Amies v.*

* The last-mentioned appeal will, of course, under s. 9 of the Amending Act, still go to the Chief Judge in Bankruptcy, but from him, under s. 18 of this Act, *supra*, to the new Court of Appeal.

† There is no appeal under that section on a question of fact. *Cousins v. The London Deposit Bank*, 1 Ex. D., 404; 45 L. J. (C. P.), 573; 35 L. T., 484.

‡ 33 L. T., 338; 24 W. R., 39; 1 Charley's Cases (Court), 60.

Clarke, should be at liberty to appeal *ex parte* within eight days to the proper Divisional Court, none having then being formed and the last day for appealing having arrived.*

Act 1873,
s. 46.

On November 20th, 1875, Mr. Justice Quain refused, at chambers, a rule *nisi* calling upon the opposite side to show cause why the decision of a County Court Judge in their favour should not be reversed.† No question, therefore, arose here as to the non-existent Divisional Court, the power exercised by Mr. Justice Quain being clearly vested in him by the express terms of section 6 of the County Courts Act, 1875.

On the 23rd of November, 1875, the eight days granted by Mr. Justice Lush, in *Amies v. Clarke*, being about to expire, and the Divisional Court not having yet been formed, his lordship gave the defendant at chambers two days further time for appealing.‡

On the 24th of November, 1875, the defendant, acting on a suggestion of Mr. Justice Lush at chambers on the preceding day, applied to Vice-Chancellor Malins, but his lordship reminded him that the jurisdiction of a Vice-Chancellor to hear an appeal from a County Court Judge in a Chancery suit is now taken away, and he suggested an application to the Master of the Rolls. The Master of the Rolls said he had no power to form a Divisional Court of Appeal.§

The defendant then applied to the Common Pleas Division, who suggested a renewed application at chambers.||

On November 25th, 1875, Mr. Justice Quain granted a rule *nisi* calling upon the plaintiff to show cause at chambers why the decision of the County Court Judge in his favour should not be reversed; and his lordship had his attention called to the course taken by Vice-Chancellor Malins in *Eccles v. Eccles* (*ubi supra*), but said that he "would not be disposed to follow exactly the form of the order in that case."¶

* *Amies v. Clarke*, 1 Charley's Cases (Chambers), 20.

† 1 Charley's Cases (Chambers), 24.

‡ *Amies v. Clarke*, 1 Charley's Cases (Chambers), 21.

§ *Ibid.*, W. N., 1875, p. 210 (before Malins, V.C.); *Times*, Nov. 25th, 1875 (before the M.R.); 1 Charley's Cases (Court), 54.

¶ *Ibid.* (*ubi supra*).

|| *Amies v. Clarke*, 1 Charley's Cases (Chambers), 21.

Act 1873,
s. 45.

By the 16th of the Rules of the Supreme Court, December, 1875, Order VIII., Rule 19, a scheme for the formation of the Divisional Court for Appeals from Inferior Courts was, at length, promulgated:—

“ In order to constitute Divisional Courts for the determination of Appeals from Inferior Courts under section 45 of the Judicature Act, 1873, each Division of the High Court of Justice shall, before the 1st of January, 1876, select one of the Judges of such division to act until the 1st of January, 1877, and so on before every 1st of January subsequent to the 1st of January, 1876, to act for the twelve months next ensuing.

“ Any two or more of the Judges so selected shall constitute a Divisional Court for the purpose of the said section.

“ Any other Judge of the High Court of Justice may, by arrangement between himself and any one of the Judges so selected, act for such last-mentioned Judge in any particular case or cases, or on any particular day or days.

“ The Judges so selected shall make such arrangements as they shall think fit, as to the manner in which application may be made to them, or any of them, in Court or chambers, under the 6th sect. of 38 & 39 Vict. c. 50, relative to appeals by motion under that Act.”

On the 17th of December, 1875, a rule *nisi* was granted at chambers for a new trial by a County Court Judge, cause to be shown before the Divisional Court, which was still non-existent.†

On the 20th of December, 1875, the Divisional Court on Appeal being still non-existent, the plaintiff showed cause at chambers in *Amies v. Clarke*. The decision of the County Court Judge was reversed by Mr. Justice Quain with costs.‡ The defendant's indomitable perseverance was thus at length rewarded.

On the 21st of December, 1875, Mr. Justice Quain granted an appeal at chambers from a County Court Judge, granted a rule *nisi*, cause to be shown before the Divisional Court, which was still non-existent.§

Later on, on the same day, which was the last of the sittings, Mr. Justice Quain, in an appeal at chambers from a County Court Judge, enlarged the time for appealing, remarking, however, at the same time, that

* The County Courts Act, 1876.

† *Hurst and Son v. Lloyd*, 1 Charley's Cases (Chambers), 24.

‡ *Amies v. Clarke*, 1 Charley's Cases (Chambers), 22.

§ 1 Charley's Cases (Chambers), 24.

icant might have asked him "at once" for a Act 1873,
s. 45.

On 20th of January, 1876, the Judges of the Divisional Court for Appeals from Inferior Courts having been asked, but no time named for it to sit, the time being for a rule *nisi* to show cause why the decision of the County Court Judge should not be reversed was expressed by Mr. Justice Lindley, "until such time as the Divisional Court" should "sit."†

On 24th of January, 1876, on an application for an extension of time for appealing from a County Court Judge Mr. Justice Archibald treated it as a first hearing for a rule *nisi*, and adjourned *the further* till the first sitting of the new Divisional Court.‡ Much perplexity prevailed in the Admiralty Division. Mr. Justice Phillimore held that his jurisdiction as Judge of the Court of Admiralty, to extend the time for appealing from a decree or order of a County Court in an Admiralty suit, is expressly preserved by the 34th and 35th sections of the present Act, and that it is not taken away by the present section. His lordship, therefore, granted an extension of time in the case before him.§ Mr. Justice Hannen took the view, that the jurisdiction of Sir James Hannen remained intact, but only "until Rules of Court for the purpose of holding Divisional Court for the hearing of appeals from County Courts."|| An application arose on November 9th, 1875, but was not decided till November 16th. On November 10th an objection to Mr. Justice Phillimore hearing an appeal in a similar case having been taken, it was arranged (prior to the final decision in the last case) that the hearing of the appeal on the 16th should be proceeded with *de bene esse*.¶

An application for a rule calling on Justices to show cause why a case should not be stated under the 20 & 21

Charley's Cases (Chambers), 24.

v. *Nicholson*, 2 Charley's Cases (Chambers), 8.

Persse, 2 Charley's Cases (Chambers), 9.

Two Brothers, 1 P. D., 52; 45 L. J. (P. D. and A.), 47;

12; 1 Charley's Cases (Court), 45.

Two Brothers, *ubi supra*.

Mathilde, *Times*, November 11th, 1875; 1 Charley's Cases

Act 1873,
s. 45.

Vict. c. 43, should be made to the Queen's Bench, and not to the Divisional Court, under this section.*

If an action commenced in the Queen's Bench is removed by consent to the County Court, the appeal lies to the Queen's Bench, and not to the Divisional Court, under this section.†

By the eleventh of the Rules of the Supreme Court, December, 1876, it is now provided as follows:—"Rule 16 of the Rules of the Supreme Court, December, 1875, is hereby repealed, and instead thereof the following provision shall take effect:—Every Judge of the High Court of Justice for the time being shall be a Judge to hear and determine Appeals from Inferior Courts, under section 45 of the Supreme Court of Judicature Act, 1873. All such Appeals (except Admiralty Appeals from Inferior Courts, which, until further order, shall be assigned as heretofore to the present Judge of the Admiralty Court) shall be entered in one list by the Officers of the Crown Office of the Queen's Bench Division; and shall be heard by such Divisional Court of the Queen's Bench, Common Pleas, or Exchequer Division as the Presidents of those Divisions shall from time to time direct. Nothing in this Order shall affect the validity of any Rule or Regulation heretofore issued with reference to such Appeals by the Divisional Court formed under the said section."

Under this Rule the Divisional Court of Appeal from Inferior Courts, *as a separate Court*, ceased to exist. Three Divisional Courts of Appeal from Inferior Courts are now held in connection with the three Common Law Divisions, and sit in rotation, so as not to clash with each other, in the three Common Law Courts, at Westminster Hall.‡

SECTION 46.—*Cases and points may be reserved for or directed to be argued before Divisional Courts.*

Subject to any Rules of Court any Judge

* *Re Ellershaw*, 1 Q. B. D., 481; 2 Charley's Cases (Court), 114.

† *Shaw v. Inglis*, *Times*, February 2nd, 1877.

‡ See, further, as to Inferior Courts and their jurisdiction, *Brown v. Shaw*, 1 Ex. D., 425; and part VI. of this Act (ss. 88, 89, 90 and 91).

of the said High Court, sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court, may reserve any case, or any point in a case, for the consideration of a Divisional Court, or may direct any case, or point in a case, to be argued before a Divisional Court; and any Divisional Court of the said High Court shall have power to hear and determine any such case or point so reserved or so directed to be argued.

Act 1873,
s. 46.

By section 22 of the Supreme Court of Judicature Act, 1875, the earlier part of this section is cited and is thus qualified: "Nothing in the Principal Act, nor in any Rule or Order made under the powers thereof or of this Act, shall take away or prejudice the right of any party to any action to have the issues for trial by Jury submitted and left by the Judge to the Jury before whom the same shall come for trial, with a proper and complete direction to the Jury upon the law, and as to the evidence applicable to such issues. Provided also, that the said right may be enforced either by motion in the High Court of Justice or by motion in the Court of Appeal founded upon an exception entered upon or annexed to the record."*

This qualification was inserted at the instance of Mr. Watkin Williams, Q.C., in Committee on the Bill in the House of Commons, as an amendment to section 21† with a view to making it clear that the words, "may reserve any case," in the present section were not intended to interfere with trial by Jury. It seems, however, pretty clear that the present section has reference exclusively to

* The following statutes were referred to in the margin of the amendment as it appeared on the notice paper, but are not noted in the margin of the new Act:—13 Ed. I. st. 1, c. 31; 3 & 4 Vict. c. 65, s. 15; 5 & 16 Vict. c. 76, s. 184; 20 & 21 Vict. c. 85, s. 39; 22 & 23 Vict. c. 1; 23 & 24 Vict. c. 144, s. 1.

† The amendment was severed in the Lords from the context, and now appears as a separate section (s. 22).

Act 1873,
s. 46.

questions of law, and that its object was to give a Judge power to reserve such questions for a Divisional Court, instead of the full Court *in banc*: *vide* s. 41, *supra*.

Lord Selborne, C., when introducing the present measure, said:—"It is proposed to *retain trial by jury in all cases where it now exists*, except in one particular." This he explained to be the reference of cases of account, whether the parties consent or not, to Official Referees. "The proposal of the Bill is that they shall determine all questions of fact or account, leaving questions of law to be determined by the Divisional Courts."*

It is provided by s. 19 of the Amending Act that "the practice and procedure in Crown Cases Reserved shall be the same as before" that "Act."

The present section is repealed by the 17th section of the Appellate Jurisdiction Act, 1876, so far as it is *inconsistent* with the provisions of that enactment. It might, with some plausibility, be argued that this section is absolutely repealed by that enactment.†

SECTION 47.—*Provision for Crown Cases Reserved.*

The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the Justices of either Bench and the Barons of the Exchequer by the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter seventy-eight, intituled, "An Act for the further amendment of the administration of the Criminal Law," or any Act amending the same, shall and may be exercised after the commencement of this Act by

* Hansard's Parliamentary Debates, 3rd Series, vol. 214, p. 346.

† See Order LVIIA. (Rules of December, 1876). No mention is made in the exhaustive list there given of points or cases reserved under this section.

the Judges of the High Court of Justice, or five of them at the least, of whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of such chiefs at least, shall be part. The determination of any such question by the Judges of the said High Court in manner aforesaid shall be final and without appeal; and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said Judges under the said Act of the eleventh and twelfth years of Her Majesty's reign.

Act 1873,
s. 47.

This section is referred to as a restriction on the right of appeal in the words, "save as hereinafter mentioned," in section 19 of this Act, *supra*.

By section 100 of this Act, *infra*, "Crown Cases Reserved" shall mean such questions of law reserved in criminal trials as are mentioned in the Act 11 and 12 Vict. c. 78. By section 1 of that Act it is provided as follows:—

"When any person shall have been convicted of any treason, felony, or misdemeanour before any Court of Oyer and Terminer or Gaol Delivery, or Court of Quarter Sessions, the Judge or Commissioner, or Justices of the Peace before whom the case shall have been tried may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the Justices of either Bench and Barons of the Exchequer; and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided, as he or they may think fit."

Act 1873,
s. 47.

By s. 3 of the same Act, it is enacted as follows:—

“The jurisdiction and authorities by this Act given to the said Justices of either Bench, and Barons of the Exchequer, shall and may be exercised by the said Justices and Barons, or five of them at the least, of whom the Lord Chief Justice of the Court of Queen’s Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, or one of such chiefs at least, shall be part, being met in the Exchequer Chamber or other convenient place; and the judgment or judgments of the said Justices and Barons shall be delivered in open Court, after hearing Counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgments of the Superior Courts of Common Law at Westminster or Dublin, as the case may be, are now delivered.”

It will be perceived that the present section practically re-enacts the provisions of the earlier part of the 3rd section of the 11 and 12 Vict. c. 78, as to the quorum of Judges, “the Judges of the High Court of Justice” being merely substituted for “the Justices of either Bench and Barons of the Exchequer.”

“Save for some error of law apparent upon the record.” Where, on a judgment of the High Court of Justice in a criminal cause or matter, there is some error of law apparent upon the record, on which no question shall have been reserved under 11 and 12 Vict. c. 78, an appeal lies, under ss. 18 and 19 of this Act, *supra*, and this section to the New Court of Appeal, in substitution for the old Appeal under the 1 Wm. IV. c. 70, s. 8, to the Court of Exchequer Chamber. This, however, is the only case in which an appeal will lie “in any criminal cause or matter” to the Court of Appeal.*

The present section was carefully analysed in the recent case of *Regina v. Steel*,† in which the Court of Appeal dismissed, on the ground that it had no jurisdiction, an appeal from a decision of the Queen’s Bench Division,

* See the 18 and 19 sections and the notes thereto, *supra*.

† 2 Q. B. D., 37; 46 L. J. (M.C.), 1; 25 W. R., 34; 35 L. T., 534.

is charging a rule calling on the defendants to show cause why the Master should not review his taxation of the defendants' costs on a criminal information against the defendants for libel, in which a verdict of "Not guilty" had been returned.* Brett, L. J., pointed out† that "the earlier portion of this section is confined to cases which come before the Court of Crown Cases Reserved, while the latter part deals with criminal matters *other* than those which come before that Court." The words of the latter part are very comprehensive—"No appeal shall lie from any judgment of the High Court in *any* criminal cause or matter." There is only one exception to this rule, *i.e.*, where "some error of law is apparent upon the record;" and even this exception does not apply, where any question relative to this "error of law apparent upon the record" has been reserved for the Court of Crown Cases Reserved, whose decision as to any question submitted to it is, under the earlier part of the present section, to be final and without appeal." In the case of *Regina v. Steel* there was no question reserved for the Court of Crown Cases Reserved, and there was no "error of law apparent upon the record." It was held that the words "no appeal shall lie from any judgment of the High Court," applied to the case without any restriction. This view of the meaning of the section was confirmed by a reference to the language of section 19 of the Supreme Court of Judicature Act, 1875, that "the practice and procedure in *all* criminal causes and matters whatsoever shall be the same as before" that "Act;" and of Order LXII. of the Rules of the Supreme Court, "nothing in these Rules shall affect the practice and procedure in any criminal proceedings." The words "practice and procedure" in these enactments expand the meaning of the word "judgment" in the present section, so as to bring within it a case like *Regina v. Steel*.

Shortly after the decision of the Court of Appeal in *Regina v. Steel*, the case of *Regina v. Fletcher*‡ came before it. The Court of Appeal in this case dismissed, on

Act 1873,
s. 47.

* See the 6 & 7 Vict. c. 96, s. 8.

† See the report of the case in the *Law Times*, *ubi supra*.

‡ 2 Q. B. D., 48; 46 L. J. (M.C.), 4; 35 L. T., 538.

Act 1873,
s. 47.

the ground that it had no jurisdiction, an appeal from a decision of the Queen's Bench Division discharging a rule for a *certiorari*, to bring up and quash a summary conviction by a Justice of the Peace for trespassing by day in pursuit of game.* The Court held that this, also, was an attempt to establish an appeal "in a criminal cause or matter," and must, therefore, by the express terms of the present section, fail. "It all turns," said Brett, L.J., "on the 47th section of the Act of 1873."†

SECTION 48.—*Motions for new trials to be heard by Divisional Courts.*

Every motion for a new trial of any cause or matter on which a verdict has been found by a jury, or by a Judge without a jury, and every motion in arrest of judgment, or to enter judgment non obstante veredicto, or to enter a verdict for plaintiff or defendant, or to enter a nonsuit, or to reduce damages, shall be heard before a Divisional Court; and no appeal shall lie from any judgment founded upon and applying any verdict, unless a motion has been made or other proceeding taken before a Divisional Court to set aside or reverse such verdict, or the judgment, if any, founded thereon, in which case an appeal shall lie to the Court of Appeal from the decision of the Divisional Court upon such motion or other proceeding.

This section is repealed by the Supreme Court of Judicature Act, 1875, s. 33, and the second Schedule.

The provisions of that Act with regard to new trials will be found in Order XXXIX., Rule 3, of which is substantially a re-enactment of Rule 48 of the Schedule to this Act; the provisions with regard to motions for judgment, in Order XL.; and the provisions with regard to motions generally, in Order LIII.

SECTION 49.—*What orders shall not be subject to Appeal.*

No order made by the High Court of Justice or any Judge thereof, by the consent of parties, or as to costs only which by law are left to the

* See the 1 & 2 Will. IV. c. 32, s. 30.

† See the Report in the *Law Times*, *ubi supra*.

discretion of the Court, shall be subject to an appeal, except by leave of the Court or Judge making such order. Act 1873,
s. 49.

If the party called on to show cause at Judges' chambers give his consent to the summons, *the order may be drawn up as of course*, unless it be for a writ of trial or a pleading of several matters, when the matter must be submitted to a Judge. So if the parties agree that costs of Counsel shall be allowed, it must be submitted to him for his certificate. *By consenting, the party precludes himself from afterwards appealing against or questioning the validity of the order.* Thus, when a summons to plead several matters was consented to, the plaintiff was holden to have debarred himself from moving to strike out one of the pleas, as being a contravention of the pleading rules.* If the order purports to be by consent and no act remains to be done by authority of the Court, the Court cannot interfere, even though the order be incorrectly drawn up; an application must first be made to the Judge to amend it.†

Where a Judge makes an order at chambers, and, exercising a discretionary power, gives costs as prayed in the summons, but annexes a condition thereto, the Court will not interfere to remove the condition, even though the order has not been drawn up.‡

By Reg. Gen., Trin. T., 1853, "In no case shall error be brought for any error in a judgment with respect to costs; but the error may be amended by the Court in which such judgment may have been given, on the application of either party."

By the 47th Rule in the Schedule to this Act "the costs of and incident to all proceedings in the High Court" shall "be in the discretion of the Court." This Rule is repealed by the Amending Act, but it is re-enacted in Order LV. Trials by jury were, in Committee on the Bill, excepted from the operation of this Rule; and therefore the scope of the present section is correspondingly narrowed.

* *Howen v. Carr*, 5 D. P. C., 305; Lush's Practice, 3rd edit., p. 953.

† *Hall v. West*, 1 D. and L., 412; Lush's Practice, 3rd edit., p. 954.

‡ *Bartlett v. Staton*, L. R., 1 C. P., 483.

Act 1873,
s. 49.

An order to pay costs, not made in the exercise of any discretion, is appealable.* *Secus*, if made in the exercise of a discretion.†

As to costs in the Court of Appeal, see Order LVIII, Rule 5. See also the Rules of the Supreme Court (Costs).‡

This section is referred to as a restriction on the right of appeal in the words, "save as hereinafter mentioned," in section 19, *supra*.

SECTION 50.—*As to discharging orders made in chambers.*

Every order made by a Judge of the said High Court in chambers, except orders made in the exercise of such discretion as aforesaid, may be set aside or discharged§ upon notice by any Divisional Court, or by the Judge sitting in Court, according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made may be assigned; and no appeal shall lie from any such order to set aside or discharge which no such motion has been made, unless by special leave of the Judge by whom such order was made, or of the Court of Appeal.

Is the word "notice" a typographical error for "motion?" The word "such," before "motion," appears to be meaningless, otherwise.

If an order has been refused by a Judge at chambers, it is irregular to make the same application to another Judge;|| and the latter will not knowingly entertain an

* *Witt v. Corcoran*, 2 Ch. D., 69; 34 L. T., 550; 24 W. R., 501.

† *Harris v. Aaron*, 25 W. R., 353.

‡ Especially Rule 32, "Special Allowances and General Provisions."

§ This does not repeal the Common Law Procedure Act, 1860, s. 17. *Dodd v. Shepherd*, 1 Ex. D., 75; 2 Charley's Cases (Court), 173.

|| *Wright v. Stevenson*, 5 Taunt., 850.

application which has thus been already disposed of. The proper course is to apply to the Court.* So, to rescind and vary an order, the motion must be made to the same Judge or to the Court. The order need not be made a Rule of Court, preparatory to moving; if it be, the motion should be to rescind the rule; in other cases it should be to rescind the order.†

Act 1873,
s. 50.

By the Interpleader Act, 11 and 12 Will. IV. c. 58, "every order to be made by a single Judge not sitting in open Court, shall be liable to be rescinded or altered by the Court in like manner as other orders made by a single Judge."

By section 4 of the Common Law Procedure Act, 1860 (23 and 24 Vict. c. 126), any order made by a Judge upon an application for relief against forfeitures for breach of a covenant, or condition to insure against loss or danger by fire, shall be subject to an appeal to the Court, and may be discharged, varied, and set aside by the Court upon such terms as the Court shall think fit, upon application made thereto by any party dissatisfied with such order.

No appeal lay from a Judge at chambers when the matter was by statute left entirely in his discretion.‡

The Courts are always reluctant to interfere with the discretion exercised in any case by a Judge at chambers; and they will never now reverse his decision, unless it clearly appears that he acted on a wrong principle.§ As regards interrogatories, the Courts are in the habit of assuming that the Judge at chambers, in allowing and disallowing interrogatories, has used his discretion with reference to the particular circumstances of the case, and an appeal is generally fruitless.||

The words, "such discretion as aforesaid," in this section relate, however, only to the discretion mentioned in the previous section, *i.e.*, "as to costs, which by law are left to the discretion of the Court."

When the rule *nisi* to rescind the order of a Judge is

* *Pike v. Davis*, 6 M. & W., 546. † Lush's Practice, 3rd ed., 954-5.

‡ *Burman v. Howard*, 25 L. J. (Ex.), 289.

§ See *Edmunds v. Greenwood*, L. R., 4 C. P., 90; *Villeboisnet v. Tobin*, *id.*, 184; *Morris v. Bethel*, *id.*, 765; and *Inman v. Jenkins*, L. R., 5 C. P., 738.

|| Day's Common Law Pro. Acts, p. 308, 4th edit., citing L. R., 4 C. P., 184, 190, 191.

Act 1873.
s. 50. — discharged, it is usual to discharge it with costs, unless the point raised is new and difficult.*

Order LIV., Rule 6, of the Supreme Court, provides that in the Queen's Bench, Common Pleas and Exchequer Divisions *every appeal* to the Court from any decision at chambers shall be *by motion*.

"By special leave." Hall, V.C., has decided that no such leave is necessary where the case has been fully argued before the Judge at chambers, and this is certified in the order.†

SECTION 51.—*Provision for absence or vacancy in the office of a Judge.*

Upon the request of the Lord Chancellor it shall be lawful for any Judge of the Court of Appeal, who may consent so to do, to sit and act as a Judge of the said High Court, or to perform any other official or ministerial acts for or on behalf of any Judge absent from illness or any other cause, or in the place of any Judge whose office has become vacant, or as an Additional Judge of any Division; and while so sitting and acting any such Judge of the Court of Appeal shall have all the power and authority of a Judge of the said High Court.

Under s. 4 of the Supreme Court of Judicature Act, 1875, as amended on the Report in the House of Commons, the Lord Chancellor may request the attendance at the sittings of the Court of Appeal of an additional Judge from any one or more of the Common Law and the Probate, Divorce and Admiralty Divisions. That section, therefore, is founded on the principle of reciprocity, with this.

* *Hawkins v. Carr*, L. R., 1 Q. B., 89.

† *Murr v. Cooke*, 24 W. R., 756; 34 L. T., 751; 2 Charley's Cases (Court), 118. N.B.—As to Judges' chambers, see also *Far v. Wallis*, 2 C. P. D., 45; and *Crom v. Samuels*, 2 C. P. D., 21; and Coe's "Practice," London, 1876; Henry Sweet, 3 Chancery Lane.

The Lords Justices of Appeal (James and Mellish) were by the 7th section of the Amending Act expressly protected in the possession of the jurisdiction in lunacy with which they were clothed prior to the commencement of the Supreme Court of Judicature Acts (1st November, 1875). Hardly had the Acts come into operation when it was discovered* that the orders in lunacy being made "in Chancery," the Lords Justices of Appeal could no longer exercise the jurisdiction in lunacy. To remove the difficulty the Lord Chancellor appointed James and Mellish, L.JJ., under this section to be Additional Judges of the Chancery Division for the purpose of exercising the jurisdiction in lunacy.† Mellish, L.J., has since died.

Act 1873,
s. 51.

SECTION 52.—*Power of a single Judge in Court of Appeal.*

In any cause or matter pending before the Court of Appeal, any direction incidental thereto, not involving the decision of the appeal, may be given by a single Judge of the Court of Appeal; and a single Judge of the Court of Appeal may at any time during vacation make an *interim* order to prevent prejudice to the claims of any parties pending an appeal as he may think fit; but every such order made by a single Judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof.

The application to the Judge of the Court of Appeal is to be *by motion*, pursuant to Order LIII. of the Supreme Court.‡ The Judge has power expressly (*inter alia*) to alter the order of the cause in the list of appeals (Order LVIII., Rule 8), to enlarge the time for appealing from an

* *In Re Walton*, *Times*, Nov. 8th, 1876; 1 Charley's Cases (Court), 57.

† *Times*, November 15th, 1875; 1 Charley's Cases (Court), 58.

‡ Order LVIII., Rule 18, of the Supreme Court.

Act 1873,
s. 52.

ex parte application to the Court below (Order LVIII., Rule 10), to order the whole or any part of the evidence in the Court below to be printed for the purpose of an appeal, and to relieve any party printing such evidence without such order from the costs thereof, to which he would otherwise be subject (Order LVIII., Rule 12).

“During Vacation.” By section 28 of this Act, *supra*, it was enacted that “provision shall be made by Rules of Court for the hearing in London and Middlesex during vacation by Judges of the Court of Appeal of all such applications as may require to be immediately and promptly heard.” No such Rules of Court have been made. (See the note to Order LXI., Rule 6.)

“Or a Divisional Court thereof.” See s. 12 of the Amending Act, and the 16th section of the Appellate Jurisdiction Act, 1876.

SECTION 53.—*Divisional Courts of Court of Appeal.*

Every appeal to the Court of Appeal shall be heard or determined either by the whole Court or by a Divisional Court consisting of any number, not less than three, of the Judges thereof. Any number of such Divisional Courts may sit at the same time. Any appeal which for any reason may be deemed fit to be re-argued before decision, or to be re-heard before final judgment, may be so re-argued or re-heard before a greater number of Judges if the Court of Appeal think fit so to direct.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule.

The reason of this repeal was obvious. The Court of Appeal to which the present section was originally applicable was a large body, out of which Divisional Courts might easily have been formed. The intermediate Court of Appeal, defined by s. 4 of the Amending Act, was a smaller body—the Ordinary Judges being only three in number, the minimum number fixed by this section for a Divisional Court of the Court of Appeal.

But now by section 16 of the Appellate Jurisdiction Act, 1876, “orders for constituting and holding Divisional Courts of the Court of Appeal may be made by the President, with the concurrence of the Ordinary Judges,” whose number, by section 15 of the same Act, is increased to five.

PART III.—SITTINGS AND DISTRIBUTION OF BUSINESS. 147

By section 12 of the Amending Act an important distinction is made between the quorum of the Judges of Appeal adequate to hear an appeal from an *interlocutory*, and the quorum requisite to hear an appeal from a *final* order, decree, or judgment. Two Judges constitute a quorum for the former, three for the latter purpose.

Act 1873,
s. 53.

SECTION 54.—*Judges not to sit on Appeal from their own Judgment.*

No Judge of the said Court of Appeal shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself, or made by any Divisional Court of the High Court of which he was himself a member.

This section is repealed by section 4 of the Supreme Court of Judicature Act, 1875. It is re-enacted, however, by that section, with the substitution of the words, “was and is a member” for “was himself a member.” (See the note to that section.)

SECTION 55.—*Arrangements for business of Court of Appeal, and for hearing Appeals transferred from the Judicial Committee of the Privy Council.*

All such arrangements as may be necessary or proper for the transaction of the business from time to time pending before the Court of Appeal, and for constituting and holding Divisional Courts thereof, shall be made by and under the direction of the President and the other ex-officio and Ordinary Judges of the said Court of Appeal; and if Her Majesty shall be pleased by Order in Council to direct that the hearing of such appeals and petitions to Her Majesty in Council as hereinbefore mentioned, shall be referred to the said Court of Appeal, not less than one Divisional Court of the said Court of Appeal shall sit throughout the year (except during vacations) for the hearing of such of the appeals and petitions so referred as may from time to time be depending and ready for hearing, which Divisional Court shall be composed (as far as may be found practicable) of Judges of the Court of Appeal, who are also members of Her Majesty's Privy Council; and any member of Her Majesty's Privy Council who, having held the office of Judge in the East Indies, or in any of Her Majesty's dominions beyond the seas, shall have been appointed by Her Majesty, under the Acts relating to the Judicial Committee

Act 1873,
s. 55.

of the Privy Council, to attend the sittings of the said Judicial Committee, may attend the sittings of any such Divisional Court of the Court of Appeal; and with respect to the place of sitting of any such last-mentioned Divisional Court, and any attendance or service therein, or in aid of the proceedings thereof, which may be required from the Registrar or any other officer of Her Majesty's Privy Council, all such arrangements as may be necessary or proper shall be made by the Lord Chancellor, as President of the Court of Appeal, with the concurrence of the President for the time being of Her Majesty's Privy Council; and the President of Her Majesty's Privy Council shall from time to time give such directions to the Registrar and other officers of the said Privy Council as may be necessary or proper for the purpose of carrying such last-mentioned arrangements into effect.

The operation of this section was suspended, like that of the 21st, which is in *pari materiâ*, until the first day of November, 1876, by the second section of the Supreme Court of Judicature Act, 1875; and it has now been finally repealed by the 24th section of the Appellate Jurisdiction Act, 1876. The powers of the Judicial Committee of the Privy Council, as the Final Court of Appeal from India and the Colonies, remain intact; but the constitution of the Judicial Committee will be somewhat altered by the immediate introduction into it of the two new Lords of Appeal in Ordinary and by the gradual substitution of two more Lords of Appeal in Ordinary for the four "paid members."*

The provisions in lieu of the first paragraph of the present section will be found in section 16 of the Appellate Jurisdiction Act, 1876; the remaining portion of the section falls, of course, to the ground, by reason of the change of the Court of Appeal into an *intermediate* Court of Appeal for England (as originally contemplated by the Judicature Commission) instead of a *final* Court of Appeal for the British Empire (as contemplated by the framers of the present Act).

PART IV.

TRIAL AND PROCEDURE.

SECTION 56.—*References and Assessors.*

Subject to any Rules of Court and to such

* See, as to this, sects. 6 and 14 of the Appellate Jurisdiction Act, 1876.

right as may now exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal, may be referred by the Court or by any Divisional Court or Judge before whom such cause or matter may be pending, for inquiry and report to any Official or Special Referee,* and the report of any such Referee may be adopted wholly or partially by the Court, and may (if so adopted) be enforced as a judgment by the Court. The High Court or the Court of Appeal may also, in any such cause or matter as aforesaid in which it may think it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors. The remuneration, if any, to be paid to such Special Referees or assessors, shall be determined by the Court.

Act 1873,
s. 56.

This and the three following sections and s. 83, *infra*, relate to the same subject matter—the reference of questions and of actions to Official and Special Referees.

The following are the recommendations of the Judicature Commissioners on the subject:—

“It seems to us that it is the duty of the country to provide tribunals adapted to the trial of all classes of cases, and capable of adjusting the rights of litigant parties in the manner most suitable to the nature of the questions to be tried.

“We therefore recommend that great discretion should be given to the Supreme Court, as to the mode of trial, and

* The *Official* Referees are Mr. James Anderson, Q.C.; Mr. G. M. Dowdeswell, Q.C.; Mr. C. M. Roupell, and Mr. H. W. Verey.

Act. 1873,
s. 56.

that any questions to be tried should be capable of being tried in any Division of the Court

“ (1) by a Judge :

“ (2) by a Jury :

“ (3) by a Referee.

“ The plaintiff should be at liberty to give notice of trial by any one of these modes which he may prefer, subject to the right of the defendant to move the Judge to appoint any other mode.* When the trial is to be by a Jury or by Referee, a Judge, on application by either party, if he think the questions to be tried are not sufficiently ascertained upon the pleadings, should have power to order that issues be prepared by the parties, and if necessary settled by himself. The Judge should also, on the application of either party, have power to direct that any question of law should be first argued, that different questions of fact arising in the same suit should be tried by different modes of trial, and that one or more questions of fact should be tried before the others.

“ The system which, in all the Divisions of the Supreme Court to which it can be conveniently applied, we would suggest for the trial of matters suitable for trial by Referees, is as follows :—

“ We think that there should be attached to the Supreme Court officers to be called Official Referees, and that a Judge should have power, at any time after the writ of summons, and with or without pleadings, and generally upon such terms as he may think fit, to order a cause, or any matter arising therein, to be tried by a Referee;† and that, whenever a cause is to be tried by a Referee, such trial should be by one of these Official Referees, unless a Judge otherwise orders. We think, however, that a Judge should have power to order such trial to be by some person not an Official Referee of the Court, but who upon being so appointed should *pro hac vice* be deemed to be and should act as if he were an Official Referee. The Judge should have power to direct where the trial shall take place, and the Referee should be

* In the Common Law Divisions any party can now insist on trial by jury : *Clarke v. Cookson*, 2 Ch. D., 746 (per Hall, V.C.) ; *Sugg v. Silber*, 1 Q. B. D., 362 ; 45 L. J. (Q. B.), 682 ; 34 L. T., 682 ; 24 W. R., 640 ; but the propriety of it has been much questioned.

† The power given to the Judge by section 56 falls far short of this.

at liberty, subject to any directions which may from time to time be given by the Judge, to adjourn the trial to any place which he may deem to be more convenient.

Act 1873,
s. 56.

“The Referee should, unless the Judge otherwise direct, proceed with the trial in open Court, *de die in diem*, with power, however, to adjourn the further hearing for any cause which he may deem sufficient, to be certified under his hand to the Court.

“The Referee should be at liberty, by writing under his hand, to reserve, or pending the reference to submit any question for the decision of the Court, or to state any facts specially, with power to the Court to draw inferences; and the verdict should in such case be entered as the Court may direct. In all other respects the decision of the Referee should have the same effect as a verdict at *Nisi Prius*, subject to the power of the Court to require any explanation or reasons from the Referee, and to remit the cause or any part thereof for re-consideration to the same, or any other Referee. The Referee should, subject to the control of the Court, have full discretionary power over the whole or any part of the costs of the proceeding before him.”*

“Subject to any rules of Court.” The Rules of Court relative to Referees are Order XXXVI., Rules 2, 5, 30, 31, 32, 33, and 34, of the Rules of the Supreme Court. They follow not unfrequently the *ipsissima verba* of the Judicature Commission.

“And to such right as may now exist to have particular cases submitted to the verdict of a jury.” The right to have *all* questions of fact so submitted appears to be guaranteed by section 22 of the Amending Act, except in cases which fall within Order XXXVI., Rule 26, of the Supreme Court.

As to “Criminal proceedings,” the practice and procedure remains the same as before the Act. See Order LXII. of the Supreme Court.

The present section appears to be limited in its scope to empowering the Court or a Judge to refer any question arising in any civil cause or matter pending before it to an Official or Special Referee “*for inquiry and report.*” The powers conferred on the Judges of the High Court by

* First Report of the Judicature Commission, pp. 13, 14.

Act 1873,
s. 56.

this section, of directing Official Referees to "inquire and report" to them on questions in cases before them are very similar to those so long enjoyed by the Judges of the Court of Chancery of directing references of questions arising in Chancery suits to the Masters in Ordinary "for inquiry and report."

As to the fees which may be charged by Official Referees, see the Lord Chancellor's Order, dated the 1st of February, 1876, cited under section 83, *infra*.

The Court of Appeal has availed itself of the power conferred upon it by this section by calling to its assistance nautical Assessors.* The Admiralty Division continues, under this section, its practice of calling to its aid Trinity Masters.

SECTION 57.—*Power to direct Trials before Referees.*

In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court or a Judge, conveniently be made before a jury, or conducted by the Court through its other ordinary officers, the Court or a Judge may at any time, on such terms as may be thought proper, order any question or issue of fact or any question of account arising therein to be tried either before an Official Referee, to be appointed as hereinafter provided, or before a Special

* The nautical Assessors were first called in on Feb. 28th, 1876, in the case of *The "Dunkeld."* See the *Times*, Wednesday, Feb. 9th, 1876, and s. 4 of the Amending Act.

before Referees shall be conducted in such manner as may be prescribed by Rules of Court, subject thereto, in such manner as the Court Judge ordering the same shall direct.

Order XXXVI., Rules 2, 5, 30, 31, 32, 33, and 34, of Rules of the Supreme Court. See also sect. 56 of this *Act*, and the note thereto, and ss. 58, 59, and 83, of this *Act*, *infra*.

This section deals with *trials* before Referees. These may be either by consent of "all parties interested," or, at the order of the Court or a Judge "without such consent." The parties may consent to the appointment of an arbitrator under the old law, or a Special Referee under the new law. A consent order of reference is, in this event, made up by the Judge's Clerk, upon lodging with him a consent, signed by the solicitors to the parties.* (For form of this order see Coe's "Practice of Judges' Chambers," 115.) A summons at chambers must first be issued by the party who wishes to force the other side into reference to an Official Referee, or to a Special Referee, requiring upon him to show cause why the action should not be referred to an Official Referee or Special Referee.†

No order will not be made by a Judge at chambers compulsorily to refer an action under this section unless it involves a prolonged examination of documents or accounts, or a scientific or local investigation." Lush, J., in *Chambers*, refused to order a compulsory reference to an Official Referee of an action brought by trustees against solicitors, for negligence in making a favourable

Act 1873,
s. 57.

A compulsory reference may be ordered by a Judge at chambers, under this section, where the furniture of a house has to be examined, that being a "local investigation."*

An order was made by Mr. Justice Quain at chambers, for a compulsory reference of the plaintiff's claim, in an action by a builder for work and materials, and the defendant's counterclaim for damages for non-completion, to a Special Referee, to be agreed upon by the parties.†

An order was made by Mr. Justice Quain for a compulsory reference of an action to recover £500 for erecting a skating-rink to a Special Referee, to be agreed upon by the parties, and, in the event of their failing to agree, to a Master.‡ In this case the defendant put in an affidavit that the surveyor refused to give his certificate, and that "a local, if not a scientific, investigation was necessary."

In an action involving a question of accounts, the Judge (Huddleston, B.) suggested a reference to an Official Referee, but, at the request of Counsel, directed a verdict for the plaintiff, subject to a special case.§

Matters of account may still be compulsorily referred, without consent, under section 3 of the Common Law Procedure Act, 1854, independently of the present section.|| A summons must first be taken out by the party who seeks to force the other party into a reference to a Master, calling on him to show cause why the action should not be referred to the Master.¶

On a summons to refer to a Master a reference to a surveyor, to be agreed upon by the parties, or, if they fail to agree, to be named by the Master, may be ordered, instead of a reference to a Master.**

An order to substitute a reference to an Official or Special Referee for a reference to a Master was refused by the Judge at chambers, in an action for £5,250, for

* 1 Charley's Cases (Chambers), 29. (*Per* Quain, J.)

† *Ibid.*

‡ *Ibid.*, 28.

§ *Miles v. Duncombe*, *Times*, November 10th, 1875. 1 Charley's Cases (Court), 59.

|| 2 Charley's Cases (Chambers), 9. (*Per* Archibald, J.)

¶ *Coc's Practice of Judges' Chambers*, 110.

** 1 Charley's Cases (Chambers), 29. (*Per* Lindley, J.)

the services of the plaintiff and four clerks in doing the business of the defendants, who were underwriters.* The order for a reference to a Master had been made in this case before the new Acts came into operation.

Act 1873,
s. 57.

In a case at chambers, before Mr. Justice Quain,† the action was referred, by desire of the parties, to an arbitrator, under the Common Law Procedure Act, 1854, in preference to a Special Referee under the present section. Speaking of the new system of Referees, Mr. Justice Quain said, "It is a more elaborate procedure than under the old reference—I am afraid almost too elaborate."

The Common Law Procedure Act, 1854, s. 11, has no application to a summons taken out by the defendant, to refer, under an arbitration clause, his counterclaim, as well as the plaintiff's claim, to an arbitrator; such an application can only be made under the Supreme Court of Judicature Acts. The reason is that the Common Law Procedure Act, 1854, gives the benefit of setting up an arbitration clause to the defendant, as the person sued, and the defendant is not the person sued, as regards a counterclaim.‡

The Court will not, without consent of the parties, order a case to be tried before an Official Referee under this section, where there are charges of fraud and the issues to be tried involve the character and reputation of one of the parties.§

SECTION 58.—*Power of Referees and effect of their Findings.*

In all cases of any reference to or trial by Referees under this Act the Referees shall be deemed to be officers of the Court, and shall have such authority for the purpose of such reference or trial as shall be prescribed by Rules of Court

* *Skinner v. Dodds*, 1 Charley's Cases (Chambers), 27.

† 1 Charley's Cases (Chambers) 26.

‡ *Atkinson v. Ellison*, 1 Charley's Cases (Chambers), 25. (Before Lush, J.)

§ *Leigh v. Brooks*, 25 W. R., 401.

Act 1873,
s. 58.

or (subject to such Rules) by the Court or Judge ordering such reference or trial; and the report of any Referee upon any question of fact on any such trial shall (unless set aside by the Court) be equivalent to the verdict of a jury.

Where an Official Referee has, on certain findings, given judgment for the plaintiff, the defendant cannot move, on the Referee's notes of the findings, that judgment be entered for him; he must move on affidavits.*

See the notes to sections 56 and 57 of this Act, *supra*, and the notes to sections 59 and 83 *infra*. Also see Order XXXVI., Rules 2, 5, 30, 31, 32, 33, and 34, of the Rules of the Supreme Court.

"Officers of the Court." This establishes a broad distinction between Referees under this Act, and ordinary arbitrators. The latter are much more independent of Court control. For other distinctions, see the notes to Order XXXVI. of the Rules of the Supreme Court.

The Court does not, by directing a reference, deprive itself of the power of making any order which may facilitate the reference. The Judge, *e.g.*, and not the Referee, is the proper authority to make an order for the discovery of documents which may be needed on the reference.†

SECTION 59.—*Powers of Court with respect to Proceedings before Referees.*

With respect to all such proceedings before Referees and their reports, the Court or Judge as aforesaid shall have, in addition to other powers, the same or the like powers as given to any Court whose jurisdiction is hereby transferred to the said High Court with reference to references to arbitration and proceedings

* *Stubble v. Boyle*, 12 N. C., 11.

† *Rowcliffe v. Leigh*, W. N. 1876, p. 266.

arbitrators and their awards respectively, by the Act 1873.
s. 59.
Common Law Procedure Act, 1854.

See the notes to sections 56, 57, and 58 of this Act. *supra*, and the notes to s. 83 of this Act, *infra*; and see also Order XXXVI., Rules 2, 5, 30, 31, 32, 33, and 34, of the Rules of the Supreme Court.

The sections of the Common Law Procedure Act, 1854, dealing with arbitrations, are ss. 3 to 17 inclusive.

Jessel, M.R., has observed* that the expense of the Official Referees was so great that they got little to do from the Chancery Division. It cost, he said, a mere trifle to go before the Chief Clerks, and most suitors preferred a little delay to a great deal of expense.

N.B.—The following very recent decisions on the sections of this Act relating to Referees may here be noted :—

In the 57th section the words “any question of account” include questions as to the price and warranty or non-warranty of particular articles of *vertu* and pictures sold to a deceased person, whose estate is being administered in Chancery; and a reference was accordingly ordered of such a “question of account” to one of the Official Referees, one of the parties refusing to assent to a reference to a Special Referee.†

The power conferred on the Court by section 57 of this Act, directing a compulsory reference, does not enable the Court in an action for obstruction of light and air to appoint a surveyor, at the instance of the defendant, to view the premises and plans, and report to the Court as to the extent of the injury, if any, likely to accrue to the plaintiff from the alleged obstruction.‡

By consent of the parties a Special Referee was appointed to inspect the plaintiff's and defendant's premises, and report to the Court as to an alleged nuisance, in an action instituted for the purpose of restraining it.§

* *Times*, February 5th, 1877.

† *Rouscliff v. Leigh*, 3 Ch. D., 292; 24 W. R., 782; 2 Charley's Cases (Court), 128.

‡ *The Baltic Company v. Simpson*, 24 W. R., 390; 2 Charley's Cases (Court), 119.

§ *Broder v. Saillard*, 2 Ch. D., 692; 45 L. J. (Ch.), 414; 2 Charley's Cases (Court), 121.

Act 1873,
s. 59.

If a cause, commenced before the 1st of November 1875, is referred to a Master after that date, the Master's decision cannot be reviewed by the Court under section 56, 57 and 58 of this Act, although the order of reference directs that the proceedings shall be continued before the Master under the new practice.* The Common Pleas in this case appear to have assumed that the reference to Referee under this Act is in all cases *for report only*; but this seems open to considerable doubt.

See, also, *Lloyd v. Lewis*.†

SECTION 60.—*Her Majesty may establish District Registries in the country for the Supreme Court.*

And whereas it is expedient to facilitate the prosecution in country districts of such proceedings as may be more speedily, cheaply, and conveniently carried on therein, it shall be lawful for Her Majesty, by Order in Council, from time to time to direct that there shall be District Registrars‡ in such places as shall be in such order mentioned for districts to be thereby defined, from which writs of summonses for the commencement of actions in the High Court of Justice may be issued, and in which such proceedings may be taken and recorded as are hereinafter mentioned; and Her Majesty may thereby appoint that any Registrar of any County Court, or any Registrar or Prothonotary or District Prothonotary of any local Court whose jurisdiction is hereby transferred to the said High Court of Justice, or from

* *Cruickshank v. The Floating Baths Swimming Company (Limited)*, 1 C. P. D., 260; 45 L. J. (C. P.), 684; 34 L. T., 733; 24 W. R., 644; 2 Charley's Cases (Court), 128.

† 2 Ex. D., 7; 25 W. R., 102; 35 L. T., 532, 539.

‡ Query, a misprint for "Registries."

which an appeal is hereby given to the said Court of Appeal, or any person who, having been a District Registrar of the Court of Probate, or of the Admiralty Court, shall under this Act become and be a District Registrar of the said High Court of Justice, or who shall hereafter be appointed such District Registrar, shall and may be a District Registrar of the said High Court for the purpose of issuing such writs as aforesaid, and having such proceedings taken before him as are hereinafter mentioned. This section shall come into operation immediately upon the passing of this Act.

Act 1873,
s. 60.

This section is amended by section 13 of the Supreme Court of Judicature Act, 1875, by which it is provided that two persons may be appointed joint District Registrars, and that the Registrar of any Inferior Court of Record (other than a County Court) in any district shall be qualified to be a District Registrar for that district or for any part of it. The same section also provides that "every District Registrar shall be deemed to be an officer of the Supreme Court, and be subject, accordingly, to the jurisdiction of such Court or of the Divisions thereof."

For a list of the local Courts whose jurisdiction is transferred to the High Court of Justice, see section 16 of this Act, *supra*, and as to the Appellate Jurisdiction of the Court of Appeal from local Courts, see s. 18, subsections (2) and (3), and section 45 of this Act, *supra*.

The scheme of establishing District Registries was thus introduced to the notice of the House of Lords by Lord Selborne, C., in 1873* :—"There is another subject with which I have attempted to deal, and its object is to remove what for twenty years and more has been represented as a grievance by solicitors of Liverpool and other large towns. These gentlemen have constantly urged that, to make a measure perfect, means should be given, subject to the

* *Hansard's Parliamentary Debates*, 3rd Series, vol. 214, pp. 347, 348.

Act 1873,
s. 60.

control of the Court, to take formal proceedings, such as giving out writs and the like, in local Registries in the country. This suggestion I have endeavoured to meet, and in effect, all country Registries over which the Court will have control under this Bill will be made available for that purpose. In many cases, I believe, the result may be the saving of much expense.”*

In the House of Commons Mr. Lopes, Q.C. (now Mr. Justice Lopes), and Sir Richard Bagge (now a Lord Justice of Appeal), urged that the duties of the District Registrar ought to be purely ministerial.

Sir George Jessell, S.G. (now Master of the Rolls), said he thought he could relieve his learned friends from some of their apprehensions by pointing out that the powers to be conferred upon District Registrars were to be subject to Rules of Court.†

It will be seen, however, on referring to the Rules of the Supreme Court, Order XXXV., that the duties of a District Registrar are much more than ministerial. Thus, by Rule 4, “where an action proceeds in a District Registry, the District Registrar may exercise all such authority and jurisdiction in respect of the action as may be exercised by a Judge at chambers, except such as by these Rules a Master of the Queen’s Bench, Common Pleas, or Exchequer Division is precluded from exercising.” In other words, the powers of a District Registrar are co-extensive with those of a Master of any of the Common Law Courts under the 30 and 31 Vict. c. 68 and the Reg. Gen. Michaelmas Term, 1867 (as amended by Order LIV., Rule 2).‡ Under the present section, however, and s. 13 of the Amending Act, the choice of District Registrars is limited to Registrars of County Courts, or Inferior Courts of Record, Registrars and Prothonotaries or District Prothonotaries § of the Courts of the Counties Palatine, and the Stannaries Courts, and District Registrar

* No further allusion to District Registries was made in the course of the subsequent debates on the measure in the House of Lords.

† Hansard’s Parliamentary Debates, 3rd Series, vol. 217, pp. 182, 183, 184.

‡ See also the “Directions to the Masters of the Court;” Hil. T., 1853, as to fees of Counsel and Special Pleaders; Day’s Com. Law Pro. Acta, 534.

§ See 32 & 33 Vict. c. 37.

of the Probate and Admiralty Courts, all of whom must have had some experience.*

Act 1873,
s. 60.

The present section being expressly excepted from section 2, came in force on the 5th of August, 1873, the day on which this Act received the Royal Assent. The first appointments under the Act were not, however, made till the 13th of August, 1875. See the Order in Council, *infra*, and also the note to s. 13 of the Amending Act.

SECTION 61.—*Seals of District Registries.*

In every such District Registry such seal shall be used as the Lord Chancellor shall from time to time, either before or after the time fixed for the commencement of this Act, direct, which seal shall be impressed on every writ and other document issued out of or filed in such District Registry, and all such writs and documents, and all exemplifications and copies thereof, purporting to be sealed with the seal of any such District Registry, shall in all parts of the United Kingdom be received in evidence without further proof thereof.

See Taylor on Evidence, part I., chap. 2; and 8 and 9 Vict. c. 113, s. 1.

SECTION 62.—*Powers of District Registrars.*

All such District Registrars shall have power to administer oaths and perform such other duties in respect of any proceedings pending in the said High Court of Justice or in the said Court of Appeal as may be assigned to them from time to

* This view of the class of persons exclusively eligible for appointment as District Registrars has been confirmed by the recent appointment of Mr. H. J. Walker, Registrar of the County Court of Southampton, to be District Registrar of the High Court of Justice at Manchester, in the place of the late Mr. Worthington.

Act 1873,
s. 62.

time by Rules of Court, or by any special order of the Court.

Order XXXV. of the Rules of the Supreme Court defines the duties of the District Registrars. See also the note to s. 60 of this Act, *supra*. A District Registrar may appoint a deputy for three months.*

SECTION 63.—*Fees to be taken by District Registrars.*

The Lord Chancellor, with the sanction of the Treasury, may, either before or after the commencement of this Act, fix, and may afterwards, with the like sanction, from time to time alter, a Table of Fees to be taken by such District Registrars in respect of all business to be done under this Act; and such fees shall be received and collected by stamps, denoting in each case the amount of the fee payable. The provisions of the "Courts of Justice (Salaries and Funds) Act, 1869," as to fees to be taken by stamps, shall apply to the fees to be received and collected by stamps under this Act.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule thereto. The substituted provisions will be found in s. 98 of the Supreme Court of Judicature Act, 1875.

By the 11th of the Rules of the Supreme Court, Dec. 1875,† the District Registrar is to account for and pay over to the Treasury all moneys paid into Court at the District Registry.

SECTION 64.—*Proceedings to be taken in District Registries.*

Subject to the Rules of Court in force for the time being, writs of summons for the commencement of actions in the High Court of Justice shall be issued by the District Registrars when thereunto required; and unless any order to the contrary shall be made by the High Court of Justice, or by any Judge thereof, all such further proceedings, including proceedings for the arrest

* Appellate Jurisdiction Act, s. 22.

† Order XXXV., Rule 15.

Act 1873,
s. 64.

ation of a ship, her tackle, apparel, furni-
 urgo, or freight, as may and ought to be
 y the respective parties to such action in
 d High Court *down to and including entry for trial, or*
aintiff is entitled to sign final judgment, or to obtain an order
ccount by reason of the non-appearance of the defendant)
 o and including final judgment, or an order
 account, may be taken before the District
 rar, and recorded in the District Registry,
 h manner as may be prescribed by Rules of
 and all such other proceedings in any such
 as may be prescribed by Rules of Court
 e taken and if necessary may be recorded
 same District Registry.

Orders IV., V., XII. and XXXV. of the Rules of the
 e Court. See also the note to s. 60 of this Act,
 is to the powers conferred on District Registrars.
 the third of the Rules of the Supreme Court,
 ber, 1875,* when an action is commenced in a
 t Registry it is to be distinguished by the name of
 trict Registry.

all be issued by the District Registrars when there-
 quired.” It has been held, in view of this enact-
 hat a writ under the Bills of Exchange Act may
 ed out of a District Registry, and may require the
 ant to apply for leave to appear, and to appear in
 istrict Registry, although neither the plaintiff
 he defendant resides or carries on business
 the District; and that it is unnecessary for the
 ff to give the defendant notice on the writ that he
 e option of appearing in London. † “In section
 aid Mr. Justice Brett in that case, “the words are
 ough to comprise a writ under the Bills of Ex-
 Act.”

* V., Rule 8.

† v. *Bradnum*, 1 C. P. D., 334; 45 L. J. (C. P.), 273; 34 L. T.,
 W. R., 404; 2 Charley's Cases (Court), 132.

Act 1873,
s. 64.

The remaining portion of this section was (practically) re-enacted by Order XXXV., Rule 1, of the Rules of the Supreme Court, which has, however, been repealed by the 12th of the Rules of the Supreme Court, June, 1876. The principal alteration effected by the repealing Rule is the omission of the words "down to and including entry for trial (or if the plaintiff is entitled to sign final judgment, or to obtain an order for an account by reason of the non-appearance of the defendant)." The present section may now, therefore, be read as if these words were expunged. See, however, *Re Smith, Hutchinson v. Ward*.*

SECTION 65.—*Power for Court to remove proceedings from District Registries.*

Any party to an action in which a writ of summons shall have been issued from any such District Registry shall be at liberty at any time to apply, in such manner as shall be prescribed by Rules of Court, to the said High Court, or to a Judge in chambers of the Division of the said High Court to which the action may be assigned, to remove the proceedings from such District Registry into the proper office of the said High Court; and the Court or Judge may, if it be thought fit, grant such application, and in such case the proceedings and such original documents, if any, as may be filed therein shall upon receipt of such order be transmitted by the District Registrar to the proper office of the said High Court, and the said action shall thenceforth proceed in the said High Court in the same manner as if it had been originally commenced by a writ of summons issued out of the proper office in

* W. N., 1877, p. 67; *Times*, Monday, March 12th, 1877.

London; or the Court or Judge, if it be thought right, may thereupon direct that the proceedings may continue to be taken in such District Registry.

Act 1873,
s. 65.

“In such manner as shall be prescribed by Rules of Court.” See Order XXXV., Rules 11, 12 and 13, of the Rules of the Supreme Court

SECTION 66.—*Accounts and Inquiries may be referred to District Registrars.*

It shall be lawful for the Court, or any Judge of the Division to which any cause or matter pending in the said High Court is assigned, if it shall be thought fit, to order that any books or documents may be produced, or any accounts taken or inquiries made, in the office of or by any such District Registrar as aforesaid; and in any such case the District Registrar shall proceed to carry all such directions into effect in the manner prescribed; and in any case in which any such accounts or inquiries shall have been directed to be taken or made by any District Registrar, the report in writing of such District Registrar as to the result of such accounts or inquiries may be acted upon by the Court, as to the Court shall seem fit.*

See Orders XV. and XXXIII. of the Rules of the Supreme Court as to taking accounts and making inquiries. In default of appearance a District Registrar can make an order under Order XV., Rule 1.† In all

* Mr. Finlason (“Our New Judicial System,” p. 203,) says that “the importance of local judicial officers for the conduct of local accounts and inquiries, especially in the administrative jurisdiction of Equity, is incalculable; and the measure now adopted has been urged by the most eminent men for forty years.” (See “Life of Lord Langdale,” Vol. II., pp. 10, 41.)

† *Irlam v. Irlam*, 2 Ch. D., 608; 24 W. R., 948.

Act 1873,
s. 66.

other cases, as regards taking accounts and making inquiries, the order of the Court or of a Judge is necessary under the present section, to put the Registrar in motion. But see now Order XXXV., Rule 1a, *infra*; as to which, however, see *Re Smith, Hutchinson v. Ward*.†

See Order XXXI., Rules 11-22 of the Rules of the Supreme Court, as to production of documents.

SECTION 67.—30 & 31 *Vict. c. 142, ss. 5, 7, 8 and 10, to extend to actions in High Court.*

The provisions contained in the fifth, seventh, eighth, and tenth sections of the County Courts Act, 1867, shall apply to all actions commenced or pending in the said High Court of Justice in which any relief is sought which can be given in a County Court.

Sec. 5 of the County Courts Act, 1877 (30 & 31 *Vict. c. 142*), referred to in the present section, is as follows:—

“If in any action commenced after the passing of this Act in any of Her Majesty’s Superior Courts of Record, the plaintiff shall recover a sum not exceeding £20 if the action is founded on contract, or £10 if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such Superior Court or unless the Court or a Judge at chambers shall, by a rule or order, allow such costs.

It will be perceived that the word “action” is used both in the 5th section of the County Courts Act, 1867, and in the present section. At the time when the County Courts Act, 1867, was passed, the word “action” applied only to Common Law actions. A plaintiff, therefore, who brought a suit in Chancery, which he might have brought in a County Court, was not on that ground

* *Irlam v. Irlam, ubi supra*. N.B.—For further cases relating to District Registries the reader is referred to the notes to Order XXXV. of the Rules of the Supreme Court, *infra*. † W.N. 1877, p. 67.

disentitled to costs.* The word “action” in the present section, and, by incorporation, in the 5th section of the County Courts Act, 1867, includes a *Chancery suit*.†

Act 1873,
s. 67.

By a rather strained construction of the words “any action” in the 5th section of the County Courts Act, 1867, it was held that the plaintiff in the Superior Courts recovering not more than £10 in damages, even in an action of tort in which the County Courts have no original jurisdiction, could have no costs without a certificate or order or rule for costs.‡

The present section very properly confines the operation of the 5th section of the County Courts Act, 1867, to “actions in the High Court of Justice in which any relief is sought *which can be given in a County Court*.”

The word “recover,” in the 57th section of the County Courts Act, 1867, applies not merely to cases in which the plaintiff recovers by the verdict of a jury, but, also, on a reference§ or by payment of money by the defendant into Court.¶

The 7th section of the County Courts Act, 1867, is as follows :—“When in any action of contract brought or commenced in any of Her Majesty’s Superior Courts of Common Law the claim endorsed on the writ does not exceed £50, or where such claim, though it originally exceeded £50, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding £50,¶ it shall be lawful for the defendant in the action, within eight days from the day upon which the writ shall have been served upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a Judge at chambers for a *summons* to the plaintiff to show cause why such action should not be tried in the County Court or one of the County Courts in which the action might have been

* *Scott v. Heritage*, L. R., 3 Eq., 212; *Brown v. Rye*, L. R., 17 Eq., 343.

† See the Interpretation Clause (s. 100) of the present Act, and Order I., Rule 1, of the Rules of the Supreme Court.

‡ *Craven v. Smith*, L. R., 1 Ex., 146; *Simpson v. Mackay*, L. R., 4 Q. B., 643.

§ *Cowell v. The Amnam Company*, 6 B. and S., 333; *Robertson v. Sterne*, 13 C. B. (N. S.), 161; *Smith v. Edge*, 2 H. and C., 659; *Moore v. Watson*, L. R., 2 C. P., 314.

¶ *Parr v. Lillierap*, 1 H. and C., 615; *Boulding v. Tyler*, 3 B. and S., 472.

¶ If the claim is reduced below £50 *after action brought*, this section does not apply, *Osborne v. Homburg*, 45 L. J. (Ex.), 65; 33 L. T., 534; 24 W. R., 161.

Act 1873,
s. 67.

commenced; and on the hearing of such summons the Judge shall, unless there be good cause to the contrary, order such action to be tried accordingly, and thereupon the plaintiff shall lodge the original writ and the order with the Registrar of the County Court mentioned in the order, who shall appoint a day for the hearing of the cause, notice whereof shall be sent, by post or otherwise, by the Registrar to both parties or their Attorneys, and the cause and all proceedings therein shall be heard and taken in such County Court as if the action had been originally commenced in such County Court; and the costs of the parties in respect of proceedings subsequent to the order of the Judge of the Superior Court shall be allowed according to the scale of costs in use in the County Courts, and the costs of the proceedings previously had in the Superior Court shall be allowed according to the scale in use in such latter Court."

By Order XX., Rule 1, of the County Court Rules, 1875, "where any action is remitted by order of the High Court of Justice to a County Court, the plaintiff shall lodge with the Registrar thereof the order and the writ, and also a statement of the names and addresses of the several parties to the action, and their solicitors, if any, and a concise statement of the particulars such as would be required upon entering a plaint, signed by the plaintiff or his solicitor, and the Registrar shall thereupon enter the action for trial and give notice to the parties of the day appointed for such trial, by post or otherwise, ten clear days before such day, and shall annex to the notice to the defendant a copy of the particulars."

By Rule 2, "upon being served with a notice of trial under the last preceding Rule, a defendant may proceed in all things in the same way as if the action had been brought in the County Court, and the notice so served upon him was an ordinary summons."

By Rule 3, "the Registrar shall forthwith indorse on the order the date on which the same was lodged and file the same, and the action shall proceed in all things as if it were an ordinary action in the County Court."

It will be perceived that under Rule 7 of the County Courts Act, 1867, the application to transfer the action from the

High Court to the County Court must be made within eight days after the service of the writ, and can only be made by the defendant. Act 1873,
s. 67.

The Registrar of the County Court is the officer to tax the costs.

The 8th section of the County Courts Act, 1867, is as follows :—“ Where any suit or proceeding shall be pending in the High Court of Chancery, which suit or proceeding might have been commenced in a County Court, it shall be lawful for any of the parties thereto to apply at chambers to the Judge to whose Court the said suit or proceedings shall be attached, to have the same transferred to the County Court or one of the County Courts in which the same might have been commenced, and such Judge shall have power upon such application, or without such application, if he shall see fit, to make an order for such transfer, and thereupon such suit or proceeding shall be carried on in the County Court to which the same shall be ordered to be transferred, and the parties thereto shall have the same right of appeal that they would have had had the suit or proceeding been commenced in the County Court.

See the 5th Rule of Order XX. of the County Court Rules, 1875, cited under s. 90 of this Act, *infra*, as to the transfer to the Chancery Division of the High Court of Justice of Equity Cases commenced in the County Court, in which the subject-matter of the plaintiff's claim exceeds the amount to which the jurisdiction of the County Court is limited.

An order, it will be perceived, may be made under section 8 of the County Courts Act, 1867, at the instance of any party, and, apparently, at any time. The jurisdiction under this section, however, has not been exercised, unless special reasons for it have been shown.*

The 10th section of the County Courts Act, 1867, is as follows :—“ It shall be lawful for any person against whom an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort may be brought in a Superior Court to make an affidavit that the plaintiff has no visible means of paying the

* *Picard v. Hine*, 18 L. T., 705; *Maudesley v. Maudesley*, 18 L. T., 51; *Linford v. Gudgeon*, L. R., 6 Ch., 359.

Act 1873,
s. 67.

costs of the defendant, should a verdict be not found for the plaintiff, and thereupon a Judge of the Court in which the action is brought* shall have power to make an order, that, unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the Masters of the said Court, or satisfy the Judge that he has a cause of action fit to be prosecuted in the Superior Court, all proceedings in the action shall be stayed, or, in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the Judge as aforesaid, that the cause be remitted for trial before a County Court to be therein named; and thereupon the plaintiff shall lodge the original writ and the order with the Registrar of such County Court, who shall appoint a day for the hearing of the cause, notice whereof shall be sent, by post or otherwise, by the Registrar to both parties or their Attorneys; and the County Court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by a memorandum signed by them, that the said County Court should have power to try the said action,† and the same had been commenced by plaint in the said County Court; and the costs of the parties in respect of the proceedings subsequent to the order of the Judge of the Superior Court shall be allowed according to the scale of costs in use in the County Court, and the costs of the proceedings in the Superior Court shall be allowed according to the scale in use of such latter Court."

An order to remit an action under section 10 of the County Courts Act, 1867, can only be made on the application of the defendant; but it can be made, apparently, at any time.

By Order XX., Rule 4, of the County Court Rules, 1875, "where in any action for libel or slander remitted under section 10 of the County Courts Act, 1867, to be tried in a County Court, the defendant intends to avail himself of the provisions of sections 1 and 2 of 6 & 7 Vict. c. 96, he shall give notice in writing of such intention, signed by himself or his solicitor, to the

* Any Judge at chambers has power to make the order for security, *Owens v. Woosman*, L. R., 3 Q. B., 639.

† This refers to 19 and 20 Vict. c. 108, s. 23.

Registrar five clear days before the day appointed for the trial of the action." *

Act 1873,
s. 67.

SECTION 68.—*Rules of Court may be made by Order in Council before commencement of the Act. Rules to be laid before Parliament, and may be annulled on Address from either House.*

Subject to the provisions of this Act, Her Majesty may, at any time before the commencement of this Act, by and with the advice of the Lord Chancellor, the Lord Chief Justice of England, and the other Judges of the several Courts intended to be united and consolidated by this Act, or of the greater number of them (of whom the Lord Chancellor and the Lord Chief Justice of England shall be two), cause to be prepared Rules, in this Act referred to as Rules of Court, providing as follows:

- (1.) *For the regulation of the sittings of the High Court of Justice and the Court of Appeal, and of any Divisional or other Courts thereof respectively, and of the Judges of the said High Court sitting in Chambers;*
- (2.) *For the regulation of Circuits, including the times and places at which they are to be holden and the business to be transacted thereat;*
- (3.) *For the regulation of all matters consistent with or not expressly determined by the Rules contained in the Schedule hereto, which, under and for the purposes of such last-mentioned Rules, require to be, or conveniently may be, defined or regulated by further Rules of Court;*
- (4.) *And, generally, for the regulation of any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof, or to the costs of proceedings therein, or to the conduct of civil or criminal business coming within the cognizance of the said Courts respectively, for which provision is not expressly made by this Act or by the Rules contained in the Schedule hereto.*

All Rules of Court made in pursuance of this section shall be laid before each House of Parliament within forty days next after the same are made, if Parliament is then sitting, or if not, within forty days after the then next meeting of Parliament; and if an Address is presented to Her Majesty by either of the said Houses, within the next subsequent forty days on which the said House shall have sat, praying that any such Rules may be annulled, Her Majesty may thereupon by Order in Council annul the same; and the Rules so annulled shall thenceforth become void and of no effect, but without

* See, for further information, as to County Courts, Pollock's County Court Practico, 8th ed., 1876 (by Nicol and Wilson); Heywood's County Court Practice, 2nd ed., 1876, and the new County Court Rules, 1875. See also *Scutt v. Freeman*, 25 W. R., 251; *Parsons v. Tinling*, 25 W. R., 255; *Staples v. Young*, 25 W. R., 304.

Act 1873,
s. 68.

prejudice to the validity of any proceedings which may in the meantime have been taken under the same. This section shall come into operation immediately on the passing of this Act.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule thereto. The substituted provisions will be found in ss. 17, 23, 24, and 25 of the Supreme Court of Judicature Act, 1875. That part of the present section which relates to laying "Rules of Court" before Parliament within forty days is re-enacted *verbatim* in the 25th section of the Amending Act, except that it is extended to "Orders in Council." The 23rd section of the Amending Act, contains elaborate provisions for the regulation of Circuits in substitution for the second subsection of the present section. Section 24 provides for the making of Rules of Court, for the purpose of adapting Acts of Parliament to the new practice and procedure. Section 93 of the present Act contains a reference to this section in the words, "except as herein is expressly directed." One of the causes of the suspension of the Supreme Court of Judicature Act, 1873, and of the withdrawal of the Supreme Court of Judicature Bill, 1874, was the delay in the preparation and publication of the Rules, which this section empowered the Crown, on the recommendation of a majority of the Judges, to make.

It will be perceived that this is one of the sections which came into effect immediately on the passing of the Act. See s. 2 of this Act, *supra*.

The Rules framed under this section were never signed by the Judges, and never came in force.* They are now substantially embodied in the first Schedule to the Supreme Court of Judicature Act, 1875.

SECTION 69.—*Rules in Schedule to regulate Procedure till changed by other Rules after commencement of Act.*

The Rules contained in the Schedule to this Act (which shall be read and taken as part of this Act) shall come into operation immediately on the commencement of this Act, and, as to all matters to which they extend, shall

* They were, however, printed by order of the House of Commons, on the motion of Sir Wm. Harcourt, Q.C., and can be obtained at Hansard's.

thenceforth regulate the proceedings in the High Court of Justice and the Court of Appeal respectively, unless and until, by the authority hereinafter in that behalf provided, any of them may be altered or varied ; but such Rules, and also all Rules to be made before the commencement of this Act, as hereinbefore mentioned, shall for all the purposes of this Act be Rules of Court capable of being annulled or altered by the same authority by which any other Rules of Court may be made, altered, or annulled after the commencement of this Act.

Act 1873,
s. 59.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule thereto. The substituted provisions will be found in section 16 of that Act. The present section is practically re-enacted, but with the necessary alterations to adapt its provisions to the first Schedule of the Amending Act.

When introducing the present measure, Lord Selborne, C., referred to the Rules in the Schedule in the following terms:—

“It was thought by some to be a considerable defect in the Bill of 1870, that it left the whole question of procedure to be determined afterwards by extrinsic authority. In the main, rules of procedure must be so determined. At the same time, nothing is more important than to have a good start; and, profiting by the discussions of 1870 my predecessor* obtained the assistance of some eminent members of the Judicature Commission, who drew up a series of Rules embodying the recommendations of the Commission on that subject, which, since they were first framed, have been further considered and revised; and those Rules will be found in the Schedule of the Bill. I may say, generally, that they cover all the main points of procedure, and their object is to get rid of long and expensive pleadings, to establish a single uniform system, to constitute the means of giving a decision when there is no practical defence, and in many other respects to introduce useful improvements.”†

It may be added, that the Rules of the Schedule, although they are repealed by the Amending Act, are re-enacted, almost *verbatim*, in the first Schedule to that Act, being incorporated with the Rules of Court referred to in the note to the last section.

* Lord Hatherley, C.

† Hansard's Parliamentary Debates, 3rd Series, vol. 214, p. 347.

Act 1873,
s. 70.

SECTION 70.—*Rules of Probate, Divorce, Admiralty, and Bankruptcy Courts to be Rules of the High Court.*

All Rules and Orders of Court which shall be in force in the Court of Probate, the Court for Divorce and Matrimonial Causes, the Admiralty Court, and the London Court of Bankruptcy respectively at the time of the commencement of this Act, except so far as they are hereby expressly varied, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively, in the same manner in all respects as if they had been contained in the Schedule to this Act, until they shall respectively be altered or annulled by any Rules of Court made after the commencement of this Act.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule. The substituted provisions will be found in section 18 of that Act. Section 70 of the Principal Act is re-enacted, with the substitution of “appeals from the Chief Judge in Bankruptcy” for “the London Court of Bankruptcy.” This alteration is rendered necessary by the severance of the London Court of Bankruptcy from the High Court of Justice under sections 9 and 33 and the second Schedule to that Act, and the retention of appeals to the Court of Appeal from the Chief Judge in Bankruptcy, provided by section 17 of the present Act and saved by subsection (2) of section 9 of that Act.

See, as to the Rules and Orders of Court here referred to, the Appendix II. to Browne’s “Treatise on the Principles and Practice of the Court for Divorce and Matrimonial Causes,” 3rd edition (1876); Appendix II. to Coote’s “Practice of the Court of Probate,” 7th edition (1876); the Appendix to Williams and Bruce’s “Jurisdiction and Practice of the High Court of Admiralty;” and pp. 507 and 598 of Roche and Hazlett’s “Law and Practice in Bankruptcy,” 2nd edition (1873).

SECTION 71.—*Criminal Procedure, subject to future Rules, to remain unaltered.*

Subject to any Rules of Court to be made under and by virtue of this Act the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice and in the Court of Appeal respectively, including the practice and procedure with respect to Crown Cases Reserved

shall be the same as the practice and procedure in similar causes and matters before the passing of this Act.

Act 1873,
s. 71.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule. The substituted provisions will be found in sec. 19 of that Act.* The present section is re-enacted, with the alterations necessary to adapt it to the first Schedule of that Act.

SECTION 72.—*Act not to affect Rules of Evidence or Juries.*

Nothing in this Act or in the Schedule hereto, or in any Rules of Court to be made by virtue hereof, save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to jurymen or juries.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule. The substituted provisions will be found in section 20 of that Act.* The present section is re-enacted, with the addition of the word "first" before "Schedule."

SECTION 73.—*Saving of existing Procedure of Courts when not inconsistent with this Act or Rules.*

Save as by this Act, or by any Rules of Court (whether contained in the Schedule to this Act, or to be made under the authority thereof), is or shall be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is hereby transferred to the said High Court, and to the said Court of Appeal respectively, under or by virtue of any law, custom, General Orders, or Rules whatsoever, and which are not inconsistent with this Act or with any Rules contained in the said Schedule or to be made by virtue of this Act, may continue to be used and practised in the said High Court of Justice and the said Court of Appeal respectively, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective Courts of which the jurisdiction is so transferred, if this Act had not passed.

This is one of the transition clauses of this Act. It is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule. The substituted

* See the notes to that section.

Act 1873,
s. 73.

provisions will be found in the 21st section of that Act. The present section is re-enacted, with the alteration necessary to adapt it to the Amending Act.

SECTION 74.—*Power to make and alter Rules after commencement of Act.*

From and after the commencement of this Act, the Supreme Court may at any time, with the concurrence of a majority of the Judges thereof present at any meeting for that purpose held (of which majority the Lord Chancellor shall be one), alter or annul any Rules of Court for the time being in force, or make any new Rules of Court, for the purpose of regulating all such matters of practice and procedure in the Supreme Court, or relating to the suitors or officers of the said Court, or otherwise, as under the provisions of this Act or may be regulated by Rules of Court: Provided, that any Rule made in the exercise of this power, whether for altering or annulling any then existing Rule, or for any other purpose, shall be laid before both Houses of Parliament, within the same time, and in the same manner and with the same effect in all respects, as is hereinbefore provided with respect to the said Rules to be made before the commencement of this Act, and may be annulled and made void in the same manner as such last-mentioned Rules.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule. The substituted provisions will be found in section 17 of that Act. As to the power to make Rules before the commencement of the Act, see section 68, *supra*.

SECTION 75.—*Councils of Judges to consider Procedure and Administration of Justice.*

A Council of the Judges of the Supreme Court, of which due notice shall be given to all the said Judges, shall assemble once at least in every year, on such day or days as shall be fixed by the Lord Chancellor, with the concurrence of the Lord Chief Justice of England, for the purpose of considering the operation of this Act and of the Rules of Court for the time being in force, and also the working of the several offices and the arrangements relative to the duties of the officers of the

said Courts respectively, and of inquiring and examining into any defects which may appear to exist in the system of procedure or the administration of the law in the said High Court of Justice or the said Court of Appeal, or in any other Court from which any appeal lies to the said High Court, or any Judge thereof, or to the said Court of Appeal: And they shall report annually to one of Her Majesty's Principal Secretaries of State what (if any) amendments or alterations it would in their judgment be expedient to make in this Act, or otherwise relating to the administration of justice, and what provisions (if any), which cannot be carried into effect without the authority of Parliament, it would be expedient to make for the better administration of justice. Any Extraordinary Council of the said Judges may also at any time be convened by the Lord Chancellor.

Act 1873,
s. 75.

The Common Law Judges were accustomed to meet together from time to time, for the purpose of consultation; but it is apprehended that such a meeting as that contemplated in this section, of all the Judges, whether of Equity or Common Law (for the expression "Supreme Court" includes the Judges of the Court of Appeal as well as the Judges of the High Court of Justice), has been in modern times unknown. It is calculated to produce the most beneficial effects, by breaking down the barrier of prejudice which still subsists, it is to be feared, between the sages of Equity and of the Common Law. Viewed in the light of this section, the Supreme Court is a deliberative assembly.

The 27th section speaks of "Her Majesty in Council" making orders regulating the vacations to be observed, upon a report or recommendation of the Council of Judges

Act 1873,
s. 75.

of the Supreme Court. The 32nd section, *supra*, of "Her Majesty in Council" ordering a reduction or increase in the number of Divisions of the High Court or in the number of Judges attached to any such Division upon a "report or recommendation of the Council of Judges of the Supreme Court;" and it will be seen that the present section speaks of a report being sent to Her Majesty's Principal Secretaries of State by the Council of Judges.

The reader will be reminded of the *Consilium Regium* which so frequent mention is made in old statutes. Lord Hale, Sir Edward Coke, and other old law writers. Sir William Blackstone says that "when the King's Council is mentioned generally, it must be defined and particularized, and understood *secundum subjectam materiam* and if the subject be of a legal nature, then by 'King's Council' is understood his Council for matters at law, namely, his Judges." *

SECTION 76.—*Acts of Parliament relating to the former Courts to be read as applying to Courts established under this Act.*

All Acts of Parliament relating to the several Courts and Judges, whose jurisdiction is hereby transferred to the said High Court of Justice and the said Court of Appeal respectively, wherein any of such Courts or Judges are mentioned or referred to, shall be construed and take effect, so far as relates to anything to be done after the commencement of this Act, as if the said High Court of Justice or the said Court of Appeal, and the Judges thereof respectively, as the case may be, had been mentioned therein instead of such Courts or Judges.

* 1 Black. Com., 229; 1 Inst., 110; 3 Inst., 125.

ges or of any number of the Judges, of any
or more of the Courts whose jurisdiction is
by transferred to the High Court of Justice,
ade necessary to the exercise of any power
uthority capable of being exercised after the
mencement of this Act, such power or autho-
may be exercised by and with the concur-
e, advice, or consent of the same, or a like
ber of Judges of the said High Court of Jus-
; and all general and other Commissions,
d under the Acts relating to the Central
inal Court or otherwise, by virtue whereof
Judges of any of the Courts whose jurisdic-
is so transferred may, at the commencement
is Act, be empowered to try, hear, or deter-
any causes or matters, criminal or civil,
remain and be in full force and effect, unless
until they shall respectively be in due course
w revoked or altered.

is is one of the transition clauses of this Act.
is section applies to the Common Law Procedure
: *Justice v. The Mersey Steel and Iron Company*.*
was decided, incidentally, in *Commissioners of Sewers*
Hall + that "amendamental bills" might still be filed

Act 1873,
s. 77.

PART V.

OFFICERS AND OFFICES.

SECTION 77.—*Transfer of existing Staff of Officers to Supreme Court.*

The Queen's Remembrancer and all Masters Secretaries, Registrars, Clerks of Records and Writs, Associates, Prothonotaries, Chief and other Clerks, Commissioners to take oaths of affidavits, Messengers, and other officers and assistants at the time of the commencement of this Act attached to any Court or Judge whose jurisdiction is hereby transferred to the High Court, or to the Court of Appeal, and also all Registrars, Clerks, officers, and other persons at the time of the commencement of this Act engaged in the preparation of Commissions or writs, or in the registration of judgments or any other ministerial duties in aid of, or connected with any Court, the jurisdiction of which is hereby transferred to the said Courts respectively shall, from and after the commencement of this Act, be attached to the Supreme Court, consisting of the said High Court of Justice and the said Court of Appeal: Provided, that all the duties with respect to Appeals from the Court of Chancery of the County Palatine of Lancaster, which are now performed by the Clerk of the Council of the Duchy of Lancaster, shall be performed by Registrars, Taxing Masters, and other officers b

officers so attached shall have the same and hold their offices by the same tenure upon the same terms and conditions, and receive the same salaries, and, if entitled to pension, be entitled to the same pensions, as if this Act had not passed, and any such officer who is removable by the Court to which he is now attached shall be removable by the Court to which he shall be attached under this Act, or by a majority of the Judges thereof.

Existing Registrars and Clerks to the Registrars in the Chancery Registrars' office retain any right of succession secured to them by Act of Parliament, so as to entitle them to office, or in any substituted office, to the extent to appointments with similar or analogous duties and with equivalent salaries.

Business to be performed in the High Court of Justice and in the Court of Appeal respectively, or in any Divisional or other Court of Justice, or in the Chambers of any Judge thereof,

Act 1873,
s. 77.

Rules of Court, with this qualification, that the duties required to be performed by any officer shall be the same, or duties analogous to those which he performed previously to the passing of this Act; and, subject to such Rules of Court, all such officers respectively shall continue to perform the same duties, as nearly as may be, in the same manner as if this Act had not passed.

All Secretaries, Clerks, and other officers attached to any existing Judge who under the provisions of this Act shall become a Judge of the High Court of Justice, or of the Court of Appeal, shall continue attached to such Judge and shall perform the same duties as those which they have hitherto performed, or duties analogous thereto; and all such last-mentioned officers shall have the same rank and hold their offices by the same tenure, and upon the same terms and conditions, and receive the same salaries, and, if entitled to pensions, be entitled to the same pensions, as if this Act had not passed: Provided that the Lord Chancellor may, with the consent of the Treasury, increase the salary of any existing officer whose duties are increased by reason of the passing of this Act.

Upon the occurrence of a vacancy in the office of any officer coming within the provisions of this section, the Lord Chancellor, with the concurrence of the Treasury, may, in the event of such office being considered unnecessary, abolish the same, or may reduce the salary, or alter the

Designation or duties thereof, notwithstanding that the patronage thereof may be vested in an existing Judge. Nothing in this Act contained shall interfere with the office of Marshal attending any Commissioner of Assize.

Act 1873,
s. 77.

This is one of the transition clauses of this Act.

The principal statutes in connection with "the Queen's Remembrancer" are as follows:—As to his appointment, the 22 and 23 Vict. c. 21; as to his duties generally, the 3 and 4 Will. IV. c. 99; as to his duties in revenue matters in the Court of Exchequer, the 5 Vict. c. 5, and 5 and 6 Vict. c. 86; as to the regulation of his office and the approval of the Sheriffs of London and Middlesex, and tender of rents by the Corporation of London in his office, the 22 and 23 Vict. c. 21; as to his salary, the 29 and 30 Vict. c. 101; as to the issue of the writ of *distringas* from his office, the 28 and 29 Vict. c. 104.

As to the appointment, salaries, duties, and superannuation of Masters and their officers, see the 7 Will. IV. and 1 Vict. c. 30; 17 and 18 Vict. c. 94; 22 Vict. c. 26, s. 14; 29 and 30 Vict. c. 101; 30 and 31 Vict. c. 68; and 32 and 33 Vict. c. 18.

"Secretaries"—"Registrars."—For the statutes referring to these officers, see the statutes collected by Mr. Wynne E. Baxter, in his notes to the "Judicature Acts," on the various Courts and Judges.

"Clerks of Records and Writs."—The statutes referring to these offices will be found collected by Mr. Baxter in note 5, "The High Court of Chancery of England," in the second division of the list of statutes, "Officers and Income."

"Associates."—The statutes referring to this officer will be found among the statutes collected by Mr. Baxter in note 36, "Commission of Assize;" and note 24, "Superior Courts of Common Law."

"Prothonotaries."—See the statutes collected by Mr. Baxter, note 34, "Inferior Courts of Common Law;" see also note 98, "Prothonotary or District Prothonotary of Local Court."

"Chief or other Clerks."—For the statutes referring to

Act 1873,
s. 77.

the Chief Clerks and Clerks to Judges, see notes to the various Courts and Judges, and note, "Superior Courts of Common Law," in Mr. Baxter's work. As to the Clerk of Assize and Clerk of the Crown, see note 36, "Commissioners of Assize," in Mr. Baxter's work. As to the Clerk of the Crown in Chancery his duties, salary, and the fees to be taken by him, see the 3 and 4 Will. IV. c. 84; 5 and 6 Will. IV. c. 47; 7 and 8 Vict. c. 77; 15 and 16 Vict. c. 87, s. 23; 17 and 18 Vict. c. 94; 32 and 33 Vict. c. 91.

The principal statutes on the subject of "Commissioners to take Oaths and Affidavits" are the 29 Car. II. c. 5; 3 and 4 Will. IV. c. 42; 22 Vict. c. 16; 55 Geo. III. c. 15; 16 and 17 Vict. c. 78; and 23 and 24 Vict. c. 127. Mr. Charles Ford* is of opinion that this section has "no bearing" on the position of *Solicitors* appointed Commissioners to take oaths, as to whom, see sections 82 and 84 of this Act, *infra*. The section, in Mr. Ford's opinion, relates exclusively to "the existing staff of Officers," including those who, like "Judges' Clerks," *e.g.*, are authorised to administer oaths.†

"The Clerk of the Council of the Duchy of Lancaster." The gentleman filling this post at the date of the commencement of this Act (1st November, 1875) was Mr. J. G. D. Engleheart.‡ By section 1 of the 17 and 18 Vict. c. 82, it was enacted that the Chancellor of the Duchy and County Palatine of Lancaster and the two Lords Justices of the Court of Appeal in Chancery, should form the Court of Appeal in Chancery of the County Palatine of Lancaster. The Clerk of the Council of the Duchy of Lancaster had the duty cast upon him of attending the sittings of the Court of Appeal in Chancery of the County Palatine of Lancaster; and, although the Lords Justices of Appeal generally excused the Clerk of the Council of the Duchy from such attendance, there was no enactment relieving him from the duty. The occasion of the transfer by section 18 of the present Act to the new Court of Appeal of the jurisdiction of the Court of Appeal in

* Oaths in the Supreme Court, 2nd Edition, by Charles Ford, London: *Law Times* Office, 10, Wellington Street, Strand.

† Oaths in the Supreme Court, pp. 2, 3.

‡ Mr. Engleheart still fills the same post (May, 1877).

Chancery of the County Palatine was thought a suitable opportunity for passing such an enactment. Hence the insertion of the proviso attached to the first paragraph of this section. The duty of attending upon the Court of Appeal during the hearing of appeals from the Court of Chancery of the County Palatine devolves under this proviso on the Chancery Registrar of the day.* The duty of taxing costs, which formerly devolved on the Clerk of the Council of the Duchy, in his capacity of Registrar, devolves under this proviso upon the "taxing masters" of the Supreme Court. See, further, the note to s. 95, *infra*.

Act. 1873,
s. 77.

The "distribution of business" among the "officers attached to the Supreme Court by this section" is defined by Orders LX. and LXII. of the Rules of the Supreme Court, which see, *infra*. See, also, Order LVIII., Rule 19, as to the preparation of lists by officers of the Queen's Bench.

It is provided by section 8 of the Amending Act that "the office of Registrar of Her Majesty in Ecclesiastical and Admiralty causes shall, so far as respects any appeals in which the present holder of it† would otherwise be concerned coming within the cognizance of the Court of Appeal, be deemed to be a separate office within the meaning of the "present "section, and may be dealt with accordingly."

"Abolish the same or reduce the salary." Under the powers conferred by this section, the Lord Chancellor, with the concurrence of the Treasury, has abolished the office of District Prothonotary at Manchester, which became vacant by the death of Mr. Worthington.‡

Section 34 of the Supreme Court of Judicature Act, 1875, after reciting the last paragraph of this section, enacts, that "upon the occurrence of any vacancy coming within the provisions of the "present "section, an appointment shall not be made thereto for the period of one month without the assent of the Lord Chancellor, given with the concurrence of the Treasury; and, further, the Lord Chancellor may, with the concurrence of the Treasury, suspend the making any appointment to such office for any period

* See Order LX., Rule 2, of the Rules of the Supreme Court.

† Mr. Rothery.

‡ W. N. 1876, p. 532.

Act 1873,
c. 77.

not later than the 1st of January, 1877, and may, if it be necessary, make provision in such manner as he thinks fit for the temporary discharge, in the meantime, of the duties of such office." By section 6 of the Supreme Court of Judicature Act, 1877, the 34th section of the Act of 1875 is to be construed as if the 1st of January, 1879, were therein inserted in lieu of the 1st of January, 1877.

As to the "Office of Marshal attending any Commissioner of Assize," see the 15 & 16 Vict. c. 80.

SECTION 78.—*Officers of Courts of Pleas at Lancaster and Durham.*

The existing Queen's Counsel of the County Palatine of Lancaster shall for the future have the same precedence in the county, and the existing Prothonotaries and District Prothonotaries, and other officers of the Court of Common Pleas at Lancaster and the Court of Pleas at Durham respectively, and their successors, shall (subject to Rules of Court) perform the same or the like duties, and exercise the same or the like powers and authorities in respect of all causes and matters depending in those Courts respectively at the commencement of this Act, and also in respect of all causes and matters which may afterwards be commenced in the High Court of Justice in the manner heretofore practised in the said Court of Common Pleas at Lancaster and the said Court of Pleas at Durham respectively, as at the commencement of this Act may lawfully be performed and exercised by them respectively under any Acts of Parliament for

the time being in force with respect to the said last-mentioned Courts respectively, or under any other authority; and all powers in respect of any such Prothonotaries, District Prothonotaries, or other officers of the Court of Common Pleas at Lancaster, which at the commencement of this Act may be vested by law in the Chancellor of the Duchy and County Palatine of Lancaster, under any such Act of Parliament or otherwise, and to which the concurrence of any other authority may not be required, shall and may be exercised after the commencement of this Act by the Lord Chancellor; and all the powers of making or publishing any General Rules or Orders with respect to the powers or duties of such Prothonotaries, District Prothonotaries or other officers of the said Court of Common Pleas at Lancaster or the said Court of Pleas at Durham, or with respect to the business of the said Court respectively, or with respect to any fees to be taken therein, or otherwise with reference thereto, which under any such Act as aforesaid or otherwise by law may be vested in the Chancellor of the Duchy and County Palatine of Lancaster with the concurrence of any Judges or Judge, or in any other authority, shall be exercised after the commencement of this Act in the manner hereby provided with respect to Rules of Court to be made under this Act, and (in all cases in which the sanction of the Treasury is now required) with the sanction of the Treasury;

Act 1873,
c. 78.

Act 1873,
s. 78

and all provisions made by any such Acts aforesaid, or otherwise for or with respect to the remuneration of any such Prothonotaries, District Prothonotaries, or other officers as aforesaid, shall remain and be in full force and effect, until the same shall be altered under the provisions of this Act, or otherwise by lawful authority.

This is one of the transition clauses of this Act.

See section 99 of this Act, and the note to section 95, *infra*.

Although, by section 99 the Counties of Lancaster and Durham ceased on the 1st of November, 1875, to be Counties Palatine, so far as respected the issue of Commissions of Assize, and although, by section 16 of this Act, *supra*, the jurisdiction vested at that date in the Court of Common Pleas of Lancaster, and Court of Pleas of Durham, is transferred at that date to the High Court of Justice, the then existing Queen's Counsel, Prothonotaries, District Prothonotaries, and other officers of these two local Courts are by the present section protected in the possession of their respective dignities and offices, and placed on substantially the same footing as heretofore with regard to their "duties, powers, and authorities."

The only "Palatine Silk" in Lancashire is Mr. J. J. Aston. The "existing" Prothonotaries and District Prothonotaries of that County at the commencement of the Act were Mr. T. E. Paget, Mr. T. M. Shuttleworth, and Mr. E. Worthington.*

The only individual deprived by this section of any powers and authorities previously possessed by him is the Chancellor of the Duchy of Lancaster. His powers as regards the Prothonotaries, District Prothonotaries and other officers of the late Court of Common Pleas at Lancaster are in future to be exercised by the Lord Chancellor, and his power of making Rules and Orders under the 13 & 14 Vict. c. 43, and 17 & 18 Vict. c. 82, with the concurrence

* Mr. Worthington died in 1876, and his office of District Prothonotary has been abolished. See note to last section, and W. N., 1876, p. 582.

of his Vice-Chancellor and one of the Lords Justices of Appeal, are merged in the general power of making Rules of Court under the new Acts. (See, however, sect. 95 of this Act, *infra*.)

Act 1873,
s. 78.

Provisions as to the Prothonotaries' Fee Fund Account of the County of Lancaster, and the salaries and expenses connected with the offices of Prothonotaries and District Prothonotaries under the Common Pleas at Lancaster Amendment Act, 1869, will be found in section 27 of the Supreme Court of Judicature Act, 1875, *infra*.

SECTION 79.—*Personal officers of future Judges.*

Each of the Judges of the High Court of Justice, and of the ordinary Judges of the Court of Appeal appointed respectively after the commencement of this Act, and also such of the Ordinary Judges of the Court of Appeal as have no similar officers at the time of the commencement of this Act, shall have such officers as hereinafter mentioned, who shall be attached to his person as such Judge, and appointed and removable by him at his pleasure, and who shall respectively receive the salaries hereinafter mentioned : (that is to say),

To the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, respectively, there shall be attached a Secretary, whose salary shall be £500 per annum, a Principal Clerk, whose salary shall be £400 per annum, and a Junior Clerk, whose salary shall be £200

Act 1873,
s. 79.

per annum. To each of the other Judges of the High Court of Justice, and to each of the Ordinary Judges of the Court of Appeal, there shall be attached a Principal Clerk, whose salary shall be £400 per annum in the case of the Judges of the High Court of Justice, a Junior Clerk, whose salary shall be £200 per annum.

Such one or more of the officers so attached to each of the said Judges, as each Judge shall think fit, shall be required while in attendance on any Judge, to discharge, without further remuneration, the duties of Crier in Court or on Circuit, of Usher or Train Bearer.

The duties of Chamber Clerks, so far as relating to business transacted in Chambers by Judges appointed after the commencement of this Act, shall be performed by officers of the Court in the permanent Civil Service of the Crown.

The rights of officers attached to any Judge transferred to the Supreme Court on the 1st of November, 1876, shall be preserved by s. 77 of this Act, *supra*.

This section effects a considerable change in the positions and salaries of officers attached to the person of a Judge appointed after the commencement of the Act. See note to section 35 of the amending Act, where the subject is dealt with.*

SECTION 80.—*Provisions as to officers paid no fees.*

Any existing officer attached to any existing Judge

* As to the officers attached to the persons of the three new Judges of Appeal, and the new Chancery Judge, see s. 15 of the App. Ju. Act, 1876, and s. 3 of the Supreme Court of Judicature Act, 1877.

Court or Judge whose jurisdiction is abolished or transferred by this Act, who is paid out of fees, and whose emoluments are affected by the passing of this Act, shall be entitled to prefer a claim to the Treasury; and the Treasury, if it shall consider his claim to be established, shall have power to award to him such sum, either by way of compensation, or as an addition to his salary, as it thinks just, having regard to the tenure of office by such officer and to the other circumstances of the case.

Act 1873,
s. 80.

This is one of the transition clauses of this Act.

“Existing,” i.e. on the 1st of November, 1875 (s. 100 of this Act, *infra*).

SECTION 81.—*Doubts as to the status of officers to be determined by Rule.*

Where a doubt exists as to the position under this Act of any existing officer attached to any existing Court or Judge affected by this Act, such doubts may be determined by Rules of Court: subject to this proviso, that such Rules of Court shall not alter the tenure of office, rank, pension (if any), or salary of such officer, or require him to perform any duties other than duties analogous to those which he has already performed.

This is one of the transition clauses of this Act.

“Existing.” See the note to the last section.

SECTION 82.—*Powers of Commissioners to administer Oaths.*

Every person who at the commencement of

Act 1873,
s. 82.

this Act shall be authorised to administer oaths in any of the Courts whose jurisdiction is hereby transferred to the High Court of Justice, shall be a Commissioner to administer oaths in all causes and matters whatsoever which may from time to time be depending in the said High Court or in the Court of Appeal.*

This is one of the transition clauses of this Act.

By section 84 all Commissioners to take oaths or affidavits in the Supreme Courts are to be appointed by the Lord Chancellor. As to Commissioners' fees, see the Schedule to the Rules of the Supreme Court (Costs.) (See, also, section 77 of this Act, *supra*.)

There were on the 1st of November, 1875, about 4,500 persons, almost all of them solicitors, authorized to administer oaths in some one or more of the ten Courts, whose jurisdiction was transferred to the High Court of Justice by section 16 of this Act.†

A controversy existed for some time as to whether every person authorised to administer oaths in any one or more of the transferred Courts is authorised by the present Act to administer oaths in the Supreme Court, without any regard to the limits of place named in his original Commission. The point on which the controversy mainly turned was whether London Commissioners, who only exercised their powers within ten miles of Serjeants' Inn Hall (as to Common Law Commissions), or within ten miles of Lincoln's Inn Hall (as to Chancery Commissions), are entitled to administer oaths outside those radii; and whether Country Commissioners can administer oaths in England outside the county or counties for which they were originally appointed. Mr. Charles Ford, in his "Handbook for the Use of Commissioners for Oaths,"† comes (though, with some hesitation,) to the conclusion that all Commissioners for Oaths appointed prior to the 1st of November, 1875, are now entitled to administer oaths irrespective of any limits of place in England. This

* As to the Ecclesiastical Courts, see the Solicitors' Act, s. 18, *infra*.

† Page 3.

‡ Page 4.

on is supported by the language of the present and the express terms of the new form of Commission issued since the 1st of November, 1875, by the Chancellor, under the powers conferred upon him by 84 of this Act, *infra*.

Act 1873,
s. 82.

new form of Commission is as follows :—

I, the Right Honourable Hugh McCalmont, Baron Lord High Chancellor of Great Britain, by virtue of an Act passed in the Session of Parliament, holden in the 36th and 37th years of the reign of Her present Majesty, entitled, 'An Act for the constitution of a new Court, and for other purposes, relating to the administration of Justice in England, and to authorise the transfer to the Appellate Division of such Supreme Court of the Jurisdiction of the Judicial Committee of Her Majesty's Privy Council,' and of all other powers enabling me in this behalf, do, by these presents, appoint A B, of the County of Middlesex, Esq., being a practising solicitor, to be a Commissioner to administer oaths in the Supreme Court of Judicature in England so long as he shall continue to practise as a solicitor.

Witness my hand this [1st] day of [October,

the Rules of the Supreme Court (Costs),* "Commissioners to take oaths or affidavits" are entitled to charge for every oath, declaration, affirmation and attestation made in their presence, in London or the country," "the sum of one shilling and sixpence." As to affidavits, special allowances may be made at the discretion of the taxing-master, when there are several deponents to be sworn, or it is necessary to go to a great distance or to employ an agent.

The word "oath" in the section includes "statutory declarations."† As to whether Commissioners for Oaths are statutory declarations, see Charles Ford on Oaths in the Supreme Court," pp. 7-9.

SECTION 83.—*Official Referees to be appointed.*

There shall be attached to the Supreme Court certain officers to be called Official Referees,

see also Rule 4.

† Section 100 of this Act, *infra*.

Act 1873,
s. 88.

for the trial of such questions as shall under the provisions of this Act be directed to be tried by such Referees. The number and the qualifications of the persons to be so appointed from time to time, and the tenure of their offices, shall be determined by the Lord Chancellor, with the concurrence of the Presidents of the Divisions of the High Court of Justice, or a majority of them (of which majority the Lord Chief Justice of England shall be one), and with the sanction of the Treasury. Such Official Referees shall perform the duties entrusted to them in such places, whether in London or in the country, as may from time to time be directed or authorised by any order of the said High Court, or of the Court of Appeal; and all proper and reasonable travelling expenses incurred by them in the discharge of their duties shall be paid by the Treasury out of moneys to be provided by Parliament.

See sections 56, 57, 58, 59, of this Act, *supra*, and s. 85 of this Act, *infra*, and the notes thereto. See also Order XXXVI., Rules 2, 5, 30, 31, 32, 33 and 34, of the Rules of the Supreme Court.

“The Number.” The Official Referees already appointed are four in number.

“Qualification.” The Official Referees already appointed are all Barristers-at-law. Mr. J. Anderson, Q.C., was called to the Bar on the 7th of June, 1839, and became a Queen’s Counsel in 1851; Mr. G. M. Dowdeswell, Q.C., was called to the Bar on the 6th of June, 1834, and became a Queen’s Counsel in 1866; Mr. C. M. Roupell was called to the Bar on the 24th of January, 1842; and Mr. H. W. Verey was called to the Bar on the 9th of June, 1865.

As to the hours of sitting of the Official Referees, see Order LXI., Rule 8, of the Supreme Court.*

Act 1873,
s. 83.

As to the distribution of business among the Official Referees, see Order XXXVI., Rules 29b, 29c, and 29d of the Rules of the Supreme Court† and the notes thereto, *infra*.

By the 26th section of the Amending Act, the Lord Chancellor, with the advice and consent of any three Judges of the Supreme Court, and with the concurrence of the Treasury, was empowered to fix the fees to be taken by any officer paid wholly or partly out of the public moneys, and attached to the Supreme Court.

By an Order made, under the powers conferred by this enactment, on the 24th of April, 1877, it was provided that the fee to be taken by an Official Referee attached to the Supreme Court under the provisions of the present section, "in respect of all matters, questions or issues referred to him by any order," shall be "the sum of £5 for the entire reference, irrespective of the time occupied."‡ payable *in advance* by means of a stamp affixed to the appointment paper or summons of the Official Referee.

Where the sittings under a reference are to be held elsewhere than in London, there must be paid, in addition to the above, £1. 11s. 6d. for every night the Official Referee, and 15s. for every night the Official Referee's clerk, is absent from London, together with reasonable costs of their locomotion from London and back.

A deposit on account of expenses before proceeding with such reference, or at any time during the course thereof, may be required, and a memorandum of it is to be delivered to the party making the deposit.

Where the sittings are held elsewhere than in London, a place must be provided to the satisfaction of the Official Referee in which the sittings may be held.

The Official Referees are to conform to any regulations that may be made from time to time by the Treasury or the accounting for all fees and moneys received by them.

* Added by the Rules of the Supreme Court, February, 1876.

† Added by the Rules of the Supreme Court, June, 1876.

‡ The fee fixed by the Order of the 1st of February, 1876, was "£1. 1s. for every hour or part of an hour." This was found too dear for suitors.

Act 1873,
s. 88.

SECTION 84.—*Duties, appointment, and removal of officers of Supreme Court.*

Subject to the provisions in this Act contained with respect to existing officers of the Court whose jurisdiction is hereby transferred to the Supreme Court, there shall be attached to the Supreme Court such officers as the Lord Chancellor with the concurrence of the President of the Divisions of the High Court of Justice, a major part of them, of which majority the Chief Justice of England shall be one, and with the sanction of the Treasury, may from time to time determine.

Such of the said several officers respectively as may be thought necessary or proper for the performance of any special duties, with respect to the Supreme Court generally, or with respect to the High Court of Justice or the Court of Appeal, or with respect to any one of the Divisions of the said High Court, or with respect to any particular Judge or Judges of either of the said Courts, may, by the same authority, and with the like sanction as aforesaid, be attached to the said respective Courts, Divisions, and Judges accordingly.

All officers assigned to perform duties with respect to the Supreme Court generally, or attached to the High Court of Justice or the Court of Appeal, and all Commissioners to take

or affidavits in the Supreme Court, shall be appointed by the Lord Chancellor.

Act 1873,
s. 84.

All officers attached to the Chancery Division of the said High Court, who have been heretofore appointed by the Master of the Rolls, shall continue, while so attached, to be appointed by the Master of the Rolls.

All other officers attached to any Division of the said High Court shall be appointed by the President of that Division.

All officers attached to any Judge shall be appointed by the Judge to whom they are attached.

Any officer of the Supreme Court (other than such officers attached to the person of a Judge as are hereinbefore declared to be removable by him at his pleasure) may be removed by the person having the right of appointment to the office held by him, with the approval of the Lord Chancellor, for reasons to be assigned in the order of removal.

The authority of the Supreme Court over all or any of its officers may be exercised in and by the said High Court and the said Court of Appeal respectively, and also in the case of officers attached to any Division of the High Court by the President of such Division, with respect to any duties to be discharged by them respectively.

See, as to the provisions of this Act with respect to existing officers of the Courts, whose jurisdiction is transferred by it to the Supreme Court, ss. 77, 78, 80, 81, and 82 of this Act, *supra*. Also see Order LX. of the Rules of the Supreme Court.

Act 1873,
s. 84.

As to "Commissioners to take Oaths," see sections 7 and 82 of this Act, *supra*, and the note to section 82.

The Lord Chancellor will not appoint any Solicitor Commissioner to administer Oaths unless he has complied with the following conditions:—

(1) Two months prior to the application to the Lord Chancellor he must have given formal notice to the Registrar of Solicitors, at the Hall of the Incorporated Law Society, of his intention to apply under the present section.*

(2) He must obtain a certificate from two practising Barristers, and two practising Solicitors, as to his fitness for the office of Commissioner.†

(3) He must obtain a certificate from two householders residing in his district, that an additional Commissioner required in the district, and that he is qualified to fill the office.‡

(4) He must have taken out a practising certificate at least six years prior to the date to which he gives notice to the Registrar of Solicitors.§

(5) He must *be in actual practice* as a Solicitor at the time at which he is appointed Commissioner, and his appointment only lasts "so long as he shall continue to practise as a Solicitor."||

(6) He must present a petition to the Lord Chancellor stating the length of time for which and the place where he has practised, and praying to be appointed a Commissioner.¶

(7) The petition must be accompanied by a certificate from the Deputy-Registrar of Solicitors, stating the date on which notice was given to the Registrar of Solicitors.

(8) The petition and certificate must be left at the office of the Lord Chancellor's principal secretary, or with the Lord Chancellor's purse-bearer, at the office in Queen's Court.

† See the form of notice, C. Ford on Oaths in the Supreme Court,

‡ See the form of certificate, *Ib.* 43. † *Ib.*

§ C. Ford on Oaths in the Supreme Court, 7, 42, 44.

|| See the form of Commission, cited under section 82 of this Act *supra*, and C. Ford on Oaths in the Supreme Court, 6, 7 and 45.

¶ See the form of Petition to the Lord Chancellor in C. Ford's Oaths in the Supreme Court, 44.

(9) A fee of £5 must be paid on the issuing of the Commission.*

Act 1873,
s. 84.

(10) The Commission must be left for registration at the Hall of the Incorporated Law Society, Chancery Lane, and a further fee of 1s. must then be paid.†

“Officers hereinbefore declared to be removable at pleasure.” See section 79 of this Act, *supra*.

SECTION 85.—*Salaries and Pensions of officers.*

There shall be paid to every Official Referee and other salaried officer appointed in pursuance of this Act such salary out of moneys to be provided by Parliament as may be determined by the Treasury with the concurrence of the Lord Chancellor.

An officer attached to the person of a Judge shall not be entitled to any pension or compensation in respect of his retirement from or the abolition of his office, except so far as he may be entitled thereto independently of this Act : but every other officer to be hereafter appointed in pursuance of this part of this Act, and whose whole time shall be devoted to the duties of his office, shall be deemed to be employed in the permanent Civil Service of Her Majesty, and shall be entitled, as such, to a pension or compensation in the same manner, and upon the same terms and conditions, as the other permanent civil servants of Her Majesty are entitled to pension or compensation.

* Forms of Commission, with the impressed stamp, are sold at the Inland Revenue Office.

† 23 and 24 Vict. c. 127, s. 30.

Act 1873,
s. 85.

“An officer attached to the person of a Judge.” See section 79, *supra*, and as to existing Chamber Clerks, section 35 of the Supreme Court of Judicature Act, 1875, framed by the then Attorney-General upon a new clause of the writer.

“Permanent Civil Servants.” By section 79 of this Act, *supra*, the duties of Chamber Clerks (other than the existing Chamber Clerks) shall be performed by officers of the Court in permanent Civil Service of the Crown.

See 4 and 5 Wm. IV. c. 24; 22 Vict. c. 26; and 23 and 24 Vict. c. 89, as to compensation and allowance.

SECTION 86.—*Patronage not otherwise provided for.*

Subject to the provisions hereinbefore contained, any rights of patronage and other rights or powers incident to any Court, or to the office of any Judge of any Court whose jurisdiction is transferred to the said High Court of Justice, or to the said Court of Appeal, in respect of which rights of patronage or other rights or powers no provision is or shall be otherwise made by or under the authority of this Act, shall be exercised as follows, that is to say: if incident to the office of any existing Judge, shall continue to be exercised by such existing Judge during his continuance in office as a Judge of the said High Court or of the Court of Appeal, and after the death, resignation, or removal from office of such existing Judge shall be exercised in such manner as Her Majesty may by Sign Manual direct.

This is one of the transition clauses of this Act.

“Subject to the provisions hereinbefore contained,” refers to the preceding sections of this part—Part V.—of the Act.

“Rights of patronage.” The rights of patronage, powers of appointment, &c., of existing Judges who are the Judges of the Supreme Court, are by section 11, *supra*, remain the same as if this Act had not passed.

Act 1873,
s. 86.

“Existing,” i.e., on the 1st of November, 1875 (s. 100 this Act, *infra*).

SECTION 87.—*Solicitors and Attorneys.*

From and after the commencement of this Act persons admitted as Solicitors, Attorneys, or Proctors of or by law empowered to practise in any Court, the jurisdiction of which is hereby transferred to the High Court of Justice or the Court of Appeal, shall be called “Solicitors of the Supreme Court,” and shall be entitled to the same privileges and be subject to the same obligations, far as circumstances will permit, as if this Act had not passed; and all persons who from time to time, if this Act had not passed, would have been entitled to be admitted as Solicitors, Attorneys, or Proctors of or been by law empowered to practise in any such Courts, shall be entitled to be admitted and to be called “Solicitors of the Supreme Court,” and shall be admitted by the Master of the Rolls, and shall, as far as circumstances will permit, be entitled as such Solicitors to the same privileges and be subject to the same obligations as if this Act had not passed.

Any Solicitors, Attorneys, or Proctors to whom this section applies shall be deemed to be officers of the Supreme Court; and that Court, and the High Court of Justice, and the Court of Appeal respectively, or any Division or Judge thereof,

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may exercise the same jurisdiction in respect of such Solicitors or Attorneys as any one of Her Majesty's Superior Courts of Law or Equity might previously to the passing of this Act have exercised in respect of any Solicitor or Attorney admitted to practise therein.

This is one of the transition clauses of this Act.

The term "Solicitor," used as a synonym for "Attorney," is at least as old as the reign of Queen Elizabeth. In 1574 we find amongst the "Orders for the Government of the Inns of Court" one to the effect that "if any hereafter admitted in Court practise as Attorneys or Solicitors, they shall be dismissed and expelled out of their Houses thereupon."* The term "Attorney," simply, is as old as the Norman Conquest. There is, no doubt, some confusion in the minds of persons superficially acquainted with the use of the latter term in the Year-Books and other mediæval repositories of legal lore between an Attorney, simply, and an Attorney-at-Law. An Attorney was not a lawyer, but a substitute, in the old law books. A father might appoint his son his Attorney, a wife her husband, a convent its abbot or prior; the expression "appear by Attorney" meant simply the substitution for the party in the cause of another person to act in his "turn," or stead, in his absence. This sense of the word "Attorney" is still preserved in the expression, "Power of Attorney"—a power to enable one person to represent another in his absence. It is beside the purpose of this book to trace how Attorneys eventually became Attorneys-at-Law.† The term having been introduced originally in reference to the Common Law Courts before the Court of Chancery sprang into power, the new expression "Solicitor" was adopted in the time of the Tudors to denote an Attorney-at-Law who practised in the Chancery Courts. The term "Solicitor of the Supreme

* Dugdale's "Origines," p. 312.

† Any one who wishes to pursue the subject will find all the authorities collected in "The Legal Profession," published by Ridgway, 169, Piccadilly, London.

of the Secretary of the Incorporated Law Society, an amendment on the notice paper of the House of Commons to remedy this omission. It has since been remedied by the 14th section of the Supreme Judicature Act, 1875. See the note to that section, Rules and Regulations drawn up under the section. A solicitor can now appear as a Proctor before Lord Chancellor and other Ecclesiastical Judges.†

The Master of the Rolls decided, in the case of *In Re Hat*, under the present section, a Proctor, who continues to take out his *Proctor's Certificate*, will not be called a "Solicitor of the Supreme Court." The Lordship declined, however, to decide what the privileges with regard to practising as a Solicitor are. The Proctor could, however, be *admitted* as a Solicitor without paying the £25 duty; until so admitted, he is not entitled to a Solicitor's Certificate.‡

An order for striking Solicitors off the Roll was thus made by Lord Coleridge, C.J., and the Common Pleas, in a case which came before them shortly after the commencement of the Supreme Court of Judicature.

It is now ordered that the names should be struck off the existing Roll of Attorneys now in the custody of the Master of the Rolls, and further order, if a register of Solicitors of the Supreme Court has been formed under the Judicature Act, 1875, then that the names be struck off such register, and if there be no such register, that the

Effect of the omission was considered to be that no person could

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names should not be entered on it when formed, and that notice of this order be given to the Master of the Rolls.*

The Clerk of the Petty Bag has the custody and care of the rolls or books wherein persons are enrolled as Solicitors of the Supreme Court, and is the proper officer for filing all affidavits and enrolling and registering all contracts or articles and assignments of articles relating to the admission of Solicitors of the Supreme Court; and has the custody of all books, affidavits and documents relating to Attorneys or Solicitors, which were formerly in the custody of the late several Courts of Law at Westminster.

All orders for striking any Solicitor off the Roll, or for any other purpose involving any alteration in, or addition to, the Roll of Solicitors of the Supreme Court, are filed with the Clerk of the Petty Bag. The Clerk of the Petty Bag makes such entry on, or alteration of, the Roll as may be directed by the order, and informs the Registrar of Solicitors of it.

PART VI.

JURISDICTION OF INFERIOR COURTS.

SECTION 88.—*Power by Order in Council to confer jurisdiction on Inferior Courts.*

It shall be lawful for Her Majesty from time to time by Order in Council to confer on any Inferior Court of civil jurisdiction the same jurisdiction in Equity and in Admiralty, respectively, as any County Court now has, or may hereafter have; and such jurisdiction, if and when conferred, shall be exercised in the manner by this Act directed.

The expression "any Inferior Court of civil jurisdiction" would include such Courts as the Lord Mayor's Court,

* See now, as to the Roll of Solicitors, the Rules and Regulations made under section 11 of the Amending Act, and the note to that section.

ord Hundred Court of Record, and the Passage
Liverpool.* The section, however, would embrace
of inferior jurisdiction which are not Courts of

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The Acts which confer Equity Jurisdiction on
Courts are the 28 and 29 Vict. c. 99; 30 and 31
142. The Acts which confer on County Courts
ty Jurisdiction are the 31 and 32 Vict. c. 71, and
33 Vict. c. 51. The most recent enactment is the
Courts Act, 1875 (38 and 39 Vict. c. 50). See,
new County Court Rules [1875].

ction 45 of this Act, *supra*, appeals from County
re to be brought to Divisional Courts of the High
f Justice, instead of being brought to four or five
appellate tribunals.

further, as to County Courts, the notes to that
and to section 67 of this Act, *supra*.

N 89.—*Powers of Inferior Courts having
Equity and Admiralty jurisdiction.*

ry Inferior Court which now has or which
fter the passing of this Act have jurisdic-
. Equity, or at Law and in Equity, and in
alty respectively, shall, as regards all causes
n within its jurisdiction for the time being,
power to grant, and shall grant in any
ling before such Court, such relief, redress,
edy, or combination of remedies, either
te or conditional, and shall in every such
ding give such and the like effect to every
l of defence or counterclaim, equitable or
subject to the provision next hereinafter

Jaylia, Q.C., the learned Assessor of the Passage Court at
, found this section useless for the purpose of reforming the
of his Court; he has by a few cleverly-drawn Rules (which
and, *infra*), assimilated it, not to the procedure of the County
to that of the Supreme Court.

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s. 89.

contained), in as full and ample a manner might and ought to be done in the like case the High Court of Justice.

The Judicature Commission thus expatiates, in its Report,* on the evils of the old system in County Courts:

“The present state of the County Courts may appropriately be referred to as exhibiting the strange working of a system of separate jurisdictions, even when exercised by the same Court.

“The County Court has jurisdiction in Common Law cases, up to £50 in contracts, and to £10 in torts. It has also equitable jurisdiction in certain cases when the value of the property in dispute does not exceed £500, and in at least one of such cases, namely, an administration suit, it is now competent for any County Court Judge to restrain the prosecution of actions brought by creditors in any of the Superior Courts of Common Law. By an Act of Parliament of last session some of the County Courts have also been invested with Admiralty jurisdiction in a large class of cases, where the amount in dispute does not exceed, in some cases £150, and in others £300. There is an appeal in each class of cases, within certain limits, to a Court of Common Law, to the Court of Chancery, or to the Court of Admiralty. But these jurisdictions, though conferred on the same Court and the same Judge, still remain (like the Common Law and Equity sides of the old Court of Exchequer) quite distinct and separate. The Judge has no power to administer in one and the same suit any combination of the different remedies which belong to his three jurisdictions, however convenient or appropriate such redress may be. That can only be accomplished, under the County Court system, by three distinct suits brought in the same Court and before the same Judge, carried on under three different forms of procedure, and controlled by three different Courts of Appeal. In this case, therefore, although we appear at first sight to have obtained the great desideratum, which the Common Law Commissioners call ‘the consolidation of all the elements of a complete remedy in the same Court,’

that remedy can only be had in three separate suits, and is equally great."

Act 1873,
c. 89.

every ground of defence or counterclaim equitable or

See section 24 of this Act, *supra*.

object of Part VI. is to enable inferior Courts within local and limited jurisdictions, to give the same relief to their suitors, *mutatis mutandis*, as the Supreme Court within its wide sphere. This seems all the more necessary now that the appeals from County Courts and other inferior Courts lie, under s. 45 of this Act, to the High Court of Justice.

practice below is *pro tanto*, assimilated to that above new County Court Rules [1875], many of which are *verbatim* from the Rules of the Supreme Court.*

ON 90.—*Counterclaims in Inferior Courts, and transfers therefrom.*

where in any proceeding before any such Inferior Court any defence or counterclaim of the plaintiff involves matter beyond the jurisdiction of the Court, such defence or counterclaim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief shall be given that which the Court has jurisdiction to administer shall be given to the defendant in any such counterclaim: Provided always, that in such case it shall be lawful for the High Court, or any Division or Judge thereof, if it shall appear to be right fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred from such Inferior Court to the High Court.

Court, such defence or counterclaim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief shall be given that which the Court has jurisdiction to administer shall be given to the defendant in any such counterclaim: Provided always, that in such case it shall be lawful for the High Court, or any Division or Judge thereof, if it shall appear to be right fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred from such Inferior Court to the High Court.

Pollock's and Heywood's County Court Practices, cited under the present Act, *supra*.
summons. Coe's Chamber Practice, 130.

Act 1873,
s. 90.

High Court, or to any Division thereof; and in such case the record in such proceeding shall be transmitted by the Registrar, or other proper officer, of the Inferior Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein.

The method by which proceedings will be removed, is described in Order XX. of the new County Court Rules [1875].

By Rule 7 of Order XX. of those Rules, "where any order is made by the High Court or any Division or Judge thereof for the transfer of any proceedings from the County Court to the High Court under the 90th section of the Supreme Court of Judicature Act, 1873, or under section 3 of the County Courts Act, 1865, then, subject to such order, the record in such proceeding shall be transmitted by the Registrar in the following manner:—The Registrar shall make and certify under his hand, office copies of all entries of record in the books of the Court, and shall forthwith transmit by post or otherwise such copies, together with all such documents as shall have been filed in the action to the proper officer of the High Court. Such copies and the cost of transmission shall be paid for by the party on whose application the transfer has been made, and the Registrar may require a deposit of the costs of making such copies and transmission, before making or transmitting the same."

By Order XXXIII., Rule 19, of the same Rules, "where an Admiralty action is transferred to the High Court of Justice by order thereof, the Registrar of the Court, upon the service of the order of transfer, shall send by post the proceedings to the proper officer of such Court."

By Rule 20 of the same Order, "where a Court orders the transfer of an action to the High Court of Justice or to another Court, the Registrar shall send by post the order, together with the proceedings, to the Registrar of the High Court of Justice or to the Court to which it is transferred."

By Rule 29 of the same Order—"Where the vessel has been arrested or has been seized under a warrant of execution, and the sale of the vessel has been ordered to be transferred to the High Court of Justice, the vessel shall be retained by the High Bailiff until the Marshal shall, by order of the High Court of Justice, take possession thereof."

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s. 90.

By Rule 30 of the same Order—"A solicitor desiring that the sale of any vessel or property should be conducted in the High Court of Justice, may at any time after judgment give security to the amount of £10, and deliver to the Registrar an application for an order for the transfer of the proceedings for sale to the said Court."

By Rule 31 of the same Order—"The Registrar shall transmit such application to the Judge for his order thereon, if the Court be not sitting, and shall in any case certify on the application that the security for costs has been given."

Provision is also made by Order XX., Rule 5, of the new (County Court) Rules for the transfer of Chancery suits to the Chancery Division, by the County Court Judge:—

"If during the progress of any action upon any claim or title, or to obtain any relief, remedy, or redress which might respectively before the 1st November, 1875, have been the subject of a plaint or petition in equity, it shall be made to appear that the subject-matter of the plaintiff's claim exceeds the amount to which the jurisdiction of the Court is limited, the Judge, if requested, may forthwith make an order for the transfer of the action to the Chancery Division of the High Court of Justice, but if not so requested the order shall not be made before fifteen days at least; and the Registrar shall make and file a copy of such order, and shall transmit the order by post, or otherwise, to the proper officer of the Chancery Division of the High Court of Justice, and shall also send notice, by post or otherwise, of the fact to all parties and persons entitled to be served with a copy of the order."*

* See the 28 and 29 Vict. c. 99, s. 9, and compare the converse process of transferring a Chancery suit to the County Court under s. 8 of the County Courts Act, 1867, cited under section 67 of this Act, *supra*.

Act 1873,
s. 91.

SECTION 91.—*Rules of Law to apply to Inferior Courts.*

The several Rules of Law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in England, so far as the matters to which such Rules relate shall be respectively cognizable by such Courts.

As section 24 of this Act is expressly limited to the "causes and matters commenced in the High Court of Justice," and the preamble to s. 25 recites as a reason for the rules which it lays down, the expediency of taking advantage of the union of the Superior Courts to amend the law, it might (but for the present section) have been contended, especially in view of the provisions of this part of the Act, that the 24th and 25th sections only applied to the Supreme Court. Much inconvenience might have resulted from the law being differently interpreted by different tribunals.

PART VII.

MISCELLANEOUS PROVISIONS.

SECTION 92.—*Transfer of Books and Papers to Supreme Court.*

All books, documents, papers, and chattels in the possession of any Court, the jurisdiction of which is hereby transferred to the High Court of Justice or to the Court of Appeal, or of any officer or person attached to any such Court, as such officer, or by reason of his being so attached, shall be transferred to the Supreme Court, and shall be dealt with by such officer or person in such manner as the High Court of Justice or the

Court of Appeal may by order direct; and any person failing to comply with any order made for the purpose of giving effect to this section shall be guilty of a contempt of the Supreme Court. Act 1873,
s. 92.

This is one of the transition clauses of this Act.

This section would apply to, *e.g.*, the debt attachment book mentioned in section 66 of the Common Law Procedure Act, 1854, and again in Order XLV., Rule 9, of the Rules of the Supreme Court.

SECTION 93.—*Saving as to Circuits, &c.*

This Act, except as herein is expressly directed, shall not, unless or until other Commissions are issued in pursuance thereof, affect the Circuits of the Judges or the issue of any Commissions of Assize, Nisi Prius, Oyer and Terminer, Gaol Delivery, or other Commissions for the discharge of civil or criminal business on Circuit or otherwise, or any patronage vested in any Judges going Circuit, or the position, salaries or duties of any officers transferred to the Supreme Court who are now officers of the Superior Courts of Common Law, and who perform duties in relation to either the civil or criminal business transacted on Circuit.

The words "except as herein is expressly directed" refer to section 68, subsection (2) *supra*, now repealed by section 33 and the second Schedule to the Amending Act. Section 23 of the Amending Act contains elaborate provisions for the regulation of Circuits. See also sections 26, 29, and 37 of this Act, *supra*, and the Order in Council as to Circuits, made under section 23 of the Amending Act on February 5th, 1876. See, also, the

Act 1873,
s. 93.

Winter Assizes Act, 1876 (39 & 40 Vict. c. 57), and the Orders in Council of the 23rd of October, 1876, made under it.

As to "patronage" vested in Judges, see sections 11 and 86 of this Act, *supra*.*

SECTION 94.—*Saving as to Lord Chancellor.*

This Act, except so far as herein is expressly directed, shall not affect the office or position of Lord Chancellor; and the officers of the Lord Chancellor shall continue attached to him in the same manner as if this Act had not passed; and all duties, which any officer of the Court of Chancery may now be required to perform in aid of any duty whatsoever of the Lord Chancellor, may in like manner be required to be performed by such officer when transferred to the Supreme Court, and by his successors.

This is one of the transition clauses of this Act.

"Except so far as herein is expressly directed," appears to point to the adjustment of the position of the Lord Chancellor in the High Court and Court of Appeal as originally planned by this Act. The Lord Chancellor is President of the Court of Appeal (s. 6 of the Act of 1875), and of the Chancery Division of the High Court (s. 31 of this Act, *supra*).

Query.—Is he President also of the High Court? (See and compare s. 5 of this Act, *supra*, and s. 3 of the Act of 1875).

"Lord Chancellor" includes "Lord Keeper of the Great Seal" (s. 100 of this Act, *infra*).

As to the transfer of officers to the Supreme Court, see s. 77 of this Act, *supra*.

* Allusion is probably here more particularly made to the appointment of Revising Barristers by the Senior Judge on Circuit, as to which, see the Order in Council of 27th June, 1876.

SECTION 95.—*Saving as to Chancellor of Lancaster.*

Act 1873,
s. 95.

This Act, except so far as is herein expressly directed, shall not affect the offices, position, or functions of the Chancellor of the County Palatine of Lancaster.

The words, "except so far as is herein expressly directed," refer to section 78 of the present Act, *supra*.

The "Chancellor of the County Palatine of Lancaster" is better known as the "Chancellor of *the* Duchy of Lancaster." In subsection (2) of section 18, and in section 78 of this Act, *supra*, the two titles are combined:—"Chancellor of the Duchy and County Palatine of Lancaster." The distinction between the Duchy and the County Palatine of Lancaster lies chiefly in this:—that the Duchy is not confined, like the County Palatine, to the County of Lancaster, but includes bits of territory, generally called "Duchy Liberties," in various other parts of England. Of these bits the best known is the district of the Savoy, adjoining the Strand, and including "Lancaster Place," Waterloo Bridge, where the Office of the Duchy of Lancaster and the Duchy Chamber are situate. The County of Lancaster was erected into a Palatinate in favour of Henry, Earl, and afterwards the first Duke of Lancaster. The charter was, however, only for his life, and ceased with his death. The Chancery of the County Palatine owes its origin to King Edward III., who created it in favour of his younger son, the famous John of Gaunt, who married Blanche, the daughter and heiress of Henry, Duke of Lancaster. Edward III. gave him the power of executing writs within the County Palatine. The grant was only for his life, but was extended by charter, with the consent of Parliament, to his heirs male in the 13th year of King Richard II. The Duchy of Lancaster and the Crown of England became united in the person of Henry Bolingbroke, son of John of Gaunt and Blanche, Duchess of Lancaster. It is said by Pulleyn, in his "Etymological Compendium," that the Duchy Court owes its origin to Henry Bolingbroke:—

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s. 95.

“ Possessing the Duchy in right of his mother, and imagining his right to it better than his right to the Crown, he resolved to secure the Duchy by separating it from the Crown, which being effected, he erected this Court for its use, wherein all matters of law and equity belonging to the Duchy or County Palatine of Lancaster are heard and decided by the Chancellor thereof ” At the instance, however, of Edward IV., on the plea that the title and estate were forfeited by attainder, an Act of Parliament was passed by which the estates were appropriated to the Crown. Henry VII. again separated the Duchy from the Crown and vested it in himself and his heirs for ever, and it has continued in the King or Queen of England for the time being ever since, but as distinct from the Crown.

The Duchy Court has not sat for thirty years. Its chief function is as a Court of Revenue, like the Exchequer, and its jurisdiction extends over the whole of the Duchy, and is not confined to the County Palatine. The Chancellor is the sole Judge, but is generally aided by a legal assessor. Mr. H. W. West, Q.C., Recorder of Manchester, is the Attorney-General of the Duchy.

The office of Queen’s Attorney and Serjeant within the County Palatine is vacant,* there being an impression, which the writer submits is erroneous, that the office is abolished. It is not mentioned in the 78th section of this Act, and was evidently attached, not to the late Court of Common Pleas at Lancaster, but to the County Palatine itself. The County Palatine is, no doubt, put an end to by s. 99 of this Act, *infra*, “ as far as respects the issue of Commissions of Assize or other like Commissions ; ” “ but not further or otherwise.” The Court of Chancery of the County Palatine of Lancaster is unaffected by the Supreme Court of Judicature Acts, nothing being said about it ; and why not, then, the office of Queen’s Attorney and Serjeant ? He has still functions to perform in connection with that Court, and on Circuit in Lancashire he has precedence over all other members of the Bar. The 78th section of this Act saves only existing Queen’s Counsel of the County Palatine. The presumption is that no more Queen’s Counsel of the County Palatine can be created, but no

* October, 1877.

such distinction is made as regards any “existing” Queen’s Attorney and Serjeant. There can, therefore, be no reason for holding that the office was saved during the life of the late Mr. Pickering, Q.C., the “existing” holder of it at the commencement of this Act, but ceased upon his death.

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s. 95.

The ordinary jurisdiction of the Chancery of the County Palatine over persons and property, where either is within the County Palatine, is precisely similar to that exercised by the Chancery Division of the High Court of Justice over persons and property in other parts of England. The Chancery Division of the High Court in some cases exercises a concurrent jurisdiction, but when both the subject of the suit and the residence of the parties litigant are within the County Palatine, the jurisdiction of the Chancery of the County Palatine is *exclusive*.*

The statutory jurisdiction of the Court arises principally under the 13 and 14 Vict. c. 43, and the 17 and 18 Vict. c. 82.†

The old General Rules and Orders made under those Acts will be found in Winstanley’s useful treatise on “The Chancery of the County Palatine of Lancaster.”

An entirely new set of General Rules and Orders was, however, issued by the Right Hon. Thomas Edward Taylor, the present Chancellor of the Duchy and County Palatine of Lancaster, with the advice and consent of Lord Justice James and Mr. Little, the Vice-Chancellor of the County Palatine, on the 12th of December, 1876, under the powers conferred by the two statutes already referred to.‡ The new General Rules and Orders came into operation on the 1st of January, 1877.§

The new General Rules and Orders of the Court of Chancery of the County Palatine are peculiarly interesting as demonstrating conclusively the flexibility of the Rules of the Supreme Court, and their adaptability to the Inferior Courts.

* *Hemetheson v. Tounstall*, Cary, 80; *Willoughby v. Brearton*, Cary, 83, 85; *Heycard v. Sherrington*, Cary, 116; *Price v. Lloyd*, Cary, 139; *Lanley v. Green*, Cary, 155; *Davis v. Davis*, Finch, 451.

† See also, 11 Geo. IV. and 1 Wm. IV. c. 36, and 2 Wm. IV. c. 38.

‡ 13 and 14 Vict. c. 43, and 17 and 18 Vict. c. 82.

§ Order LVI. of the new General Rules and Orders of the Court of Chancery of the County Palatine.

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c. 95.

With the exception (1) of the omission of all the Rules of the Supreme Court relating exclusively to actions in the Common Law Divisions—to the actions in the Probate, Divorce and Admiralty Division, or to District Registries of the Supreme Court; (2) of the insertion here and there of a few new Rules, and (3) of the substitution of the words "the Vice-Chancellor" for "a Judge," "Court" for "High Court," and the "Chancellor" for the "Lord Chancellor," the framers of the new General Rules and Orders of the Court of Chancery of the County Palatine have been able to reproduce, word for word, the language of the Rules of the Supreme Court, including those issued down to the 1st of December, 1877.

The new General Rules and Orders are edited by Mr. R. G. Marsden, and may be obtained at any of the District Registries of the Court.

The following tabular analysis, prepared by the writer, of the method of adapting the first six Rules of the Supreme Court, pursued by the framers of the County Palatine Rules, may not be uninteresting.

| Order of Supreme Court. | Portions of Order omitted. | Substituted terms. | New Rules. |
|-------------------------|---|---|------------|
| I. | Rule 2. "In any Court in which any proceeding or application of the like kind could have been taken and made," in Rule 1. | "Court of Chancery of the County Palatine of Lancaster," substituted for the Courts named in Rule 1. "Court," for "High Court," in Rules 1 and 3. "As if these Rules had not been made," for "as if this Act had not been passed," in Rule 3. | Nil. |
| II. | Rule 6. Rule 7. "And which shall specify the Division of the High Court to which it is intended that the action should be assigned," in Rule 1. "Or if the office of Lord Chancellor is vacant, in the name of the Lord Chief Justice of England." | "Or the Vice-Chancellor," for "or a Judge," in Rule 4. "The Chancellor," for "the Lord Chancellor." | Nil. |

| Order of writ. | Portions of Order omitted. | Substituted terms. | New Rules. | Act 1873, s. 95. |
|----------------------|--|--|---------------|---------------------|
| I. | Rule 6. Rule 7. | "Or the Vice-Chancellor," for "or a Judge," in Rule 1. | Nil. | |
| . | Nil. | <p>"Within the District from the Registry whereof the writ of summons shall have issued, or in case his place of business shall not be within such District then," for "and also if his place of business shall be more than 3 miles from Temple Bar," in Rule 1.</p> <p>"Within the District," for "which shall not be more than 3 miles from Temple Bar," in Rule 1.</p> <p>"Not within the District from the Registry whereof the writ of summons shall have issued then," for more than 3 miles from Temple Bar," in Rule 2.</p> | Nil. | |
| V. | <p>Rule 4. Rule 9. Rule 10. Rule 11.</p> <p>"Other than a Probate action," in Rule 1.</p> <p>"Where a defendant neither resides nor carries on business within the District out of the Registry whereof a writ of summons is issued," in Rule 2.</p> <p>"In the manner in which causes are now distinguished in such last-mentioned cause books," in Rule 8.</p> | <p>"The defendant do cause an appearance to be entered at the District Registry out of which the writ of summons shall have been issued," for "such defendant may cause an appearance to be entered at his option either in the District Registry or the London Office," in Rule 2.</p> <p>"District Registrar," for "proper officer," in Rules 6, 7, and 8; also for "the Clerks of Records and Writs in the Court of Chancery," in Rule 8.</p> | Nil. | |
| . | Nil. | "District Registrar," for "proper officer," in Rule 1. | Nil. | |

Act 1873,
s. 95.

It will be observed that the first six orders have been adopted without the insertion of a single new Rule. The first new Rule occurs in Order XI., forming Order XI., Rule 6, of the County Palatine Rules, and is as follows:—
“The practice as to service out of the jurisdiction of the Court and within the jurisdiction of the High Court, is not hereby affected, and shall be in force as to all proceedings under these Rules.”

The forms in the Appendix to the County Palatine Rules are almost identical with those of the Supreme Court, except that only those appropriate to the Chancery Division are given—*e.g.*, in Part II., of App. (A), “Indorsements of Claim,” referred to in Order III., Rule 3, only the “General Indorsements” in section I., and section VIII., “Indorsement of Character of Parties,”* are given. “Payment into Court in satisfaction” not being applicable to a Chancery suit, the forms 5 and 6 of App. (B) are omitted. Form 16 of App. (B.), “Affidavit of Scripts,” is, of course omitted, as applicable only to Probate actions. The other forms of App. (B) are reproduced *verbatim*, except that “In the Chancery of the County Palatine of Lancaster,” is substituted for “In the High Court of Justice, Chancery Division.” The amendments introduced by the Rules of the Supreme Court, issued subsequently to the 1st of November, 1875, have been carefully utilised by the framers of the County Palatine Rules, were applicable. Thus, it will be found that in the form of writ of summons for service out of the jurisdiction, the words, “by leave of the Court or a Judge,” are omitted, pursuant to Order II., Rule 3A (June, 1876). Order IX., Rule 6A (June, 1876), is, again, inserted in its proper place, with the words, “Rules hereinafter contained” substituted for “Rules of the Supreme Court.” Those of the Rules of the Supreme Court issued subsequently to the 1st of November, 1875, which are inapplicable to a Chancery suit, are omitted; *e.g.*, Order II., Rule 7A (writ of summons in Admiralty actions, December, 1875), Order III., Rules 2A and 3A (London writs and writs out of District Registry, February, 1876).

* With the omission of the endorsement applicable to “*qui tam* actions” which could, of course, have no place in a Chancery suit.

Orders XIV., XXX., XXXV., XLV., XLVI., LI., LVIII., LX., LXI., and LXII., of the Rules of the Supreme Court, are omitted, as inapplicable to the Chancery of the County Palatine, while, on the other hand, an entirely new Order (forming Order XXVIII. of the County Palatine Rules), requiring that copies of the pleadings shall be *filed*, and Order V. of the Rules of the Supreme Court (Costs), are inserted as additional Rules and form Order LII. of the County Palatine Rules.

Act 1873,
s. 95.

The Chancellor of the Duchy and County Palatine, under the powers already mentioned, and with the advice and consent of his Vice-Chancellor, issued on the 13th of December, 1876, an Order as to Court Fees, copied from the Order of the Supreme Court (28th October, 1875) as to Court Fees,* with the omission of Rule IV. (except the three last paragraphs), and the addition of certain fees at the end of the Schedule of Fees.

On the 14th of December, 1876, the Chancellor of the Duchy and County Palatine, under the same powers, and with the same advice and consent issued an Order as to Solicitors' Costs, copied from the 6th Order of the Rules of the Supreme Court (Costs), (12th August, 1875), with the omission of such portions as were inapplicable, including Rules 5, 14, 20, 23, 28 and 34 of the "Special Allowances and General Provisions."

The Chancellor of the Duchy and County Palatine used to sit at the Court of the Duchy Chamber at Westminster, with the two Judges of Assize, who had gone the last previous Circuit in the county, as a Court of Appeal from the Court of Chancery of the County Palatine.† This was attended with much expense and inconvenience;‡ and, accordingly, by the 17 and 18 Vict. c. 82, the two Lords Justices of Appeal in Chancery were substituted for the two Judges of Assize.§ The quorum might be formed either of the Lords Justices or of one of the Lords Justices and the Chancellor of the Duchy and County

* Some of the fees, specified in the column headed "Lower Scale," are higher than those specified in the corresponding column of fees in the Supreme Court, *e.g.*, on "taxation of costs."

† See the preamble to the 17 and 18 Vict. c. 82.

‡ *Ibid.* It is curious to note that Common Law Judges sat on appeal from an eminent Chancery barrister.

§ S. 1.

Act 1873,
s. 95.

Palatine.* It is said that Lord Dufferin once sat with one of the Lords Justices to make up the quorum. But the practical effect of the enactment was to transfer the appeal from the Duchy Chamber to the Court of Appeal in Chancery.

By section 18 of the present Act "all jurisdiction and powers of the Court of Appeal in Chancery of the County Palatine of Lancaster and all jurisdiction and powers of the Chancery of the Duchy and County Palatine of Lancaster, when sitting alone or apart from the Lords Justices of Appeal in Chancery as a Judge of rehearing or appeal from decrees or orders of the Court of Chancery of the County Palatine of Lancaster," are transferred to and vested in Her Majesty's Court of Appeal.† The language of this enactment appears to have been borrowed from the 2nd section of the 17 and 18 Vict. c. 82, which contains a proviso "that the Chancellor of the Duchy and County Palatine may, while sitting alone and apart from the Lords Justices, have and exercise the like jurisdiction, powers and authorities as might have been exercised by him "sitting alone, if the Act had not been passed."

SECTION 96.—*Saving as to Chancellor of the Exchequer and Sheriffs.*

The Chancellor of the Exchequer shall not be a Judge of the High Court of Justice, or of the Court of Appeal, and shall cease to exercise any judicial functions hitherto exercised by him as a Judge of the Court of Exchequer; but save as aforesaid he shall remain in the same position as to duties and salary, and other incidents of his office, as if this Act had not passed. The same order and course with respect to the appointment

* Sec. 2.

† Section 17 contains an express provision that the "jurisdiction of the Court of Appeal in Chancery of the County Palatine of Lancaster shall not be transferred to or vested in the High Court of Justice."

Act 1873,
s. 96.

Sheriffs shall be used and observed in the Exchequer Division of the said High Court as has been heretofore used and observed in the Court of Exchequer.

It seems rather extraordinary to enact that "the Chancellor of the Exchequer shall not be a Judge," but a reference to Madox will show that he was regarded as one of the Barons of the Exchequer. There is a curious entry in Madox's list of *Barones Scaccarii*, *Anno LI.*,* *Hen. III.*, in which the inference may be drawn very fairly that the only Barons of the Exchequer in that year were the Lord Treasurer and the Chancellor of the Exchequer. On entering on his office the Chancellor of the Exchequer took an oath that he would seal with the Exchequer seal no *judicial writ* of any other Court besides the Exchequer while the Lord Chancellor was within twenty miles of the place† where the Exchequer was holden.‡ The Chancellor of the Exchequer is sometimes spoken of as the Treasurer's Deputy,§ sometimes as an officer appointed by the King to keep a vigilant watch over the Treasurer.¶

"The appointment of Sheriffs." The Judges, &c., nominate three persons, as sheriffs, for each county, in the Exchequer. *Black. Comm.*, 341.

SECTION 97.—*Saving as to Lord Treasurer and office of the Receipt of Exchequer.*

Nothing in this Act contained shall affect the office of Lord Treasurer, except that any Lord Treasurer shall not hereafter exercise any judicial functions hitherto exercised by him as a Judge of the Court of Exchequer; and nothing in this

* 2 Madox's Exchequer, p. 319, citing Mich. Memor., 51 Hen. III. Rot. 2 b.

† The Exchequer then followed the King's person.

‡ Lib. Rub. Scacc., fol. 14 b., 2 Madox, 54.

§ 1 Madox, 291.

¶ 2 Madox, 51.

Act 1873,
s. 97.

Act shall affect the office of the Receipt of the Exchequer.

The Treasury has been so long "in commission" that the very name of the "Lord Treasurer" has become obsolete. It is necessary to ransack the laborious pages of Madox to find out what "judicial functions" the Lord Treasurer exercised.

He was one of the Barons, originally, of the Exchequer, and seems to have regularly sat there. In the list of "Barones Scaccarii" the name of the Thesaurarius repeatedly occurs. Indeed he may be regarded, in some sense, as having been Chief Baron, for close writs were addressed, "to the Treasurer and Barons of the Exchequer." He attested the writs issued for levying the King's revenue, directed the entries made in the great roll, and, in a word, "took care of the King's profit," the doing of which frequently involved the exercise of judicial functions. In the 18th year of Edward I., the Treasurer was associated with the Justices of the King's Bench in determining causes.*

"The receipt of the Exchequer." See the 4 and 5 Will. IV. c. 15.

SECTION 98.—*Provisions as to Great Seal being in commission.*

When the Great Seal is in commission, the Lords Commissioners shall represent the Lord Chancellor for the purposes of this Act, save that as to the Presidency of the Court of Appeal, and the appointment or approval of officers, or the sanction to any order for the removal of officers, or any other act to which the concurrence or presence of the Lord Chancellor is hereby made

* Et dictum est Justiciariis de Banco, quod, associato sibi Thesaurario et vocatis partibus, faciant quod de jure fuerit faciendum. Ry. Pl. Parl. 16, 17, anno 18 E. I; 2 Madox, 44.

necessary, the powers given to the Lord Chancellor by this Act may be exercised by the Senior Lord Commissioner for the time being.

Act 1873,
s. 98.

Some inconvenience might have arisen if the whole of the Lords Commissioners had been entitled to have a voice in the decision of cases. The equity element would have been proportionately increased.

SECTION 99.—*Provision as to Commissions in Counties Palatine.*

From and after the commencement of this Act, the Counties Palatine of Lancaster and Durham shall respectively cease to be Counties Palatine, so far as respects the issue of Commissions of Assize, or other like Commissions, but not further or otherwise; and all such Commissions may be issued for the trial of all causes and matters within such counties respectively in the same manner in all respects as in any other counties of England and Wales.

See sections 78 and 95 of this Act, *supra*, and the notes thereto.

By an Order in Council of the 23rd of December, 1876, appointing Mr. Walker the District Registrar of the Supreme Court at Manchester, it is recited "that by the death of the person* who held the office of *District Prothonotary* (of Manchester), a vacancy has occurred in the said office, and such office being considered unnecessary, the Lord Chancellor, with the concurrence of the Treasury, and in pursuance of the power and authority vested in him by the Judicature Act, 1873, has abolished the same."† This is a considerable step in the direction of still further assimilating the County Palatine of Lancaster to the

* Mr. Worthington.

† W. N., 1876, p. 532.

Act 1873,
s. 99.

other counties of England, the office of District Prothonotary being expressly saved by section 78 of the Act, *supra*.*

SECTION 100.—*Interpretation of Terms.*

In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned shall have, or include, the meanings following (that is to say,)

- “ Lord Chancellor ” shall include Lord Keeper of the Great Seal.
- “ The High Court of Chancery ” shall include the Lord Chancellor.
- “ The Court of Appeal in Chancery ” shall include the Lord Chancellor as a Judge on Re-hearing or Appeal.
- “ London Court of Bankruptcy ” shall include the Chief Judge in Bankruptcy.
- “ The Treasury ” shall mean the Commissioners of Her Majesty’s Treasury for the time being, or any two of them.
- “ Rules of Court ” shall include forms.
- “ Cause ” shall include any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown.
- “ Suit ” shall include action.
- “ Action ” shall mean a civil proceeding com-

* See section 77, *sub finem*.

menced by writ, or in such other manner as may be prescribed by Rules of Court; and shall not include a criminal proceeding by the Crown.*

Act 1873,
s. 109.

Plaintiff” shall include every person asking any relief (otherwise than by way of counterclaim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

Petitioner” shall include every person making any application to the Court, either by petition, motion, or summons, otherwise than as against any defendant.

“Defendant” shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings.

“Party” shall include every person served with notice of, or attending any proceeding, although not named on the record. .

“Matter” shall include every proceeding in the Court not in a cause.

“Pleading” shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counterclaim of a defendant.

* See *Darcy v. Whittaker*, 24 W. R., 244.

Act 1873,
c. 50.

- “ Judgment ” shall include decree.
- “ Order shall include Rule.
- “ Oath ” shall include solemn affirmation and statutory declaration.
- “ Crown cases reserved ” shall mean such questions of law reserved in criminal trials as are mentioned in the Act of the eleventh and twelfth years of Her Majesty’s reign, chapter seventy-eight.
- “ Pension ” shall include retirement and superannuation allowance.
- “ Existing ” shall mean existing at the time appointed for the commencement of this Act.

By Order LXIII. of the Rules of the Supreme Court it is enacted that the provisions of this section shall apply to those Rules.

As to the 11 and 12 Vict. c. 78, see s. 47 of this Act, *supra*. The only section to which the definition of “ Crown cases reserved,” applied was the 71st, and it has been repealed, so that the definition may be considered as having been repealed as far as this Act is concerned ; but s. 19 of the Amending Act re-enacts sect. 71 of this Act, and that Act is to be construed as one with this Act ; so that the definition applies to s. 19 of the Amending Act.

SCHEDULE.

RULES OF PROCEDURE.

"The whole of the Schedule" is repealed by section 33 and Rules 1873.
the second Schedule to the Supreme Court of Judicature Act, 1875, but is re-enacted, almost word for word, in the first Schedule to the same Act. For the purpose of comparison, the present Schedule has been retained, like the other repealed parts of this Act, and a reference to the corresponding provisions of the first Schedule to the Supreme Court of Judicature Act, 1875, has been made under each Rule. The notes appended to the Rules of the present Schedule will enable the legal practitioner or law student, who has mastered the Rules of 1874, and the Schedule to the Act of 1873, to work them in together, in the luminous order of the first Schedule to the Act of 1875.

FORM OF ACTION.

Form of Action in High Court.

1. All actions which have hitherto been commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which have hitherto been commenced by bill or information in the High Court of Chancery, or by cause in rem or in personam in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action.

All other proceedings in and applications to the High Court may, subject to Rules of Court, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if this Act had not passed.

This Rule is re-enacted,—the first clause by Order I., Rule 1, of the Amending Act, the second clause by Order VII., Rule 3 of that Act.

Rules 1873,
Rule 2.

WRIT OF SUMMONS.

Actions to be commenced by Writ.

2. *Every action in the High Court shall be commenced by a writ of summons, which shall be endorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and which shall specify the Division of the High Court to which it is intended that the action should be assigned.*

This Rule is re-enacted by Order II., Rule 1, of the Amended Act.

Form of Writ.

3. *[Forms of writs and of endorsements thereon, applicable to the several ordinary causes of action, shall be prescribed by Rules of Court, and] any costs incurred by the use of any more prolix or other forms shall be borne by the party using the same unless the Court shall otherwise direct.*

This Rule (except the part endorsed in brackets) is re-enacted by Order II., Rule 2, of the Amending Act. "Occasioned" is also substituted in that enactment for "incurred."

Acceptance of Service.

4. *No service of writ will be required when the defendant, by his solicitor agrees to accept service, and enters an appearance.*

This Rule is re-enacted by Order IX., Rule 1, of the Amending Act.

Service of Writ.

5. *When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the Court or to a Judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or Judge may make such order for substituted or other service, or for the substitution of notice for service, as may seem just.*

This Rule is re-enacted by Order IX., Rule 2, of the Amending Act. See Order X., also, of that Act.

Service out of the jurisdiction.

6. *Whenever it appears fit to the Court or to a Judge in a case in which the cause of action has arisen within the jurisdiction, or is properly cognizable against a defendant within the jurisdiction, that any person out of the jurisdic-*

the Court should be served with the writ or other process of the Court, or Judge may order such service, or such notice in lieu of service, to be given in such manner and on such terms as may seem just.

**Rules 1873,
Rule 6.**

As to the subject-matter of this Rule, Order XI., Rules 1 of the Amending Act. It is one of the few Rules not solely re-enacted. The substituted provisions define the in which service out of the jurisdiction may take place, the conditions under which it is to be made.

Special endorsement of particulars of debts or liquidated demands.

See C. L. P. Act, 1852, ss. 25, 27.

In all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money, payable by the defendant, with or without interest, upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a debt where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, or on a guaranty, whether under seal or not, where the claim is for the principal is in respect of such debt or liquidated demand, bill, note, or on a trust, the writ of summons may be specially endorsed with particulars of the amount sought to be recovered, after giving credit for payment or set-off.

In case of non-appearance by the defendant where the writ of summons is specially endorsed, the plaintiff may sign final judgment for any sum not exceeding the sum endorsed on the writ, together with interest at the rate of 5 per cent, if any, to the date of the judgment, and a sum for costs, but it shall be lawful for the Court or a Judge to set aside or vary such judgment upon terms as may seem just.

Where the defendant appears on a writ of summons so specially endorsed, the plaintiff may, on affidavit verifying the cause of action, and swearing that he believes there is no defence to the action, call on the defendant to show cause before the Court or a Judge why the plaintiff should not be at liberty to sign final judgment for the amount so endorsed, together with interest, if any, and costs; and the Court or Judge may, unless the defendant, by affidavit or otherwise, satisfy the Court or Judge that he has a good defence to the action, or discloses such facts as the Court or Judge may think sufficient to enable him to be permitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly. Permission to defend the action may be granted to the defendant on such terms and conditions, if any, as the Court or Judge may think just.

This Rule is re-enacted,—the first clause by Order III., Rule 6, the second clause by Order XIII., Rule 3, and the

**Rules 1873,
Rule 7.**

third clause (except the last sentence) by Order XIV., Rule 6, of the Amending Act. The last sentence of the third clause re-enacted by Order XIV., Rule 6, of that Act.

Special endorsement of particulars in cases of account.

8. *In all cases of ordinary account, as, for instance, in the case of a partnership or executorship or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be endorsed with a claim that such account be taken.*

In default of appearance on such summons, and after appearance, unless defendant, by affidavit or otherwise, satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the account claimed, in all directions now usual in the Court of Chancery in similar cases, shall forthwith made.

This Rule is re-enacted, clause 1 by Order III., Rule 8, and clause 2 by Order XV., Rule 1, of the Amending Act.

PARTIES.

Mis-joinder or non-joinder of parties.

9. *No action shall be defeated by reason of the mis-joinder of parties, and the Court may in every action deal with the matter in controversy so far regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without application of either party, in the manner prescribed by Rules of Court, make such order on such terms as may appear to the Court or a Judge to be just, order that the name or names of any party or parties, whether as plaintiffs or defendants, improperly joined, be struck out, and that the names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent thereto. The parties whose names are so added as defendants shall be served with a summons or notice in such manner as may be prescribed by Rules of Court, or by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice.*

This Rule is re-enacted, by Order XVI., Rule 13, of the Amending Act.

Representation of parties having same interest.

10. *Where there are numerous parties having the same interest in an action, one or more of such parties may sue or be sued, or may be authorized*

the Court to defend in such action, on behalf or for the benefit of all parties interested.

**Rules 1872,
Rule 10.**

This Rule is re-enacted by Order XVI., Rule 9, of the Amending Act.

[Partners.]

11. *Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of their respective firms, if any; and any party to an action may in such case apply by summons to a Judge in Chambers for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the Judge may direct.*

This Rule is re-enacted by Order XVI., Rule 10, of the Amending Act. See Order XI., Rule 12, of the Amending Act.

Power to determine questions as against third parties.

12. *Where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person, or where from any other cause it appears to the Court or a Judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any one or either of them, the Court or a Judge may on notice being given to such last-mentioned person, in such manner and form as may be prescribed by Rules of Court, make such order as may be proper for having the question so determined.*

This Rule is re-enacted by Order XV., Rule 17, of the Amending Act.

Provision for case of doubt as to proper parties.

13. *Where in any action, whether founded upon contract or otherwise, the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as may be prescribed by Rules of Court, or by any special order, join two or more defendants, to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action.*

The Rule is re-enacted by Order XVI., Rule 6, of the Amending Act.

Trustees, executors, &c.

14. *Trustees, executors, and administrators may sue and be sued on behalf of and representing the property or estate of which they are trustees or representatives, without joining any of the parties beneficially interested in the trust or estate, and shall be considered as representing such parties in the*

**Rules 1873,
Rule 14.**

action ; but the Court or a Judge may, at any stage of the proceedings, order any of such parties to be made parties to the action, either in addition to or in lieu of the previously existing parties thereto.

This Rule is re-enacted by Order XVI., Rule 7, of the Amending Act.

Actions by married women and infants.

15. *Married women and infants may respectively sue as plaintiffs by their next friends, in the manner practised in the Court of Chancery before the passing of this Act ; and infants may, in like manner, defend any action by their guardians appointed for that purpose. Married women may also, by the leave of the Court or a Judge, sue or defend without their husbands and without a next friend, on giving such security (if any) for costs as the Court or a Judge may require.*

This Rule is re-enacted by Order XVI., Rule 8, of the Amending Act.

Parties where there are several liabilities on the same contract.

16. *The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes.*

This Rule is re-enacted by Order XVI., Rule 5, of the Amending Act.

Abatement.

17. *An action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survives or continues, and shall not become defective by the assignment, creation, or devolution of any estate or title pendente lite.*

In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to an action, the Court or Judge may, if it is deemed necessary for the complete settlement of all the questions involved in the action, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party to the action, or be served with notice thereof in such manner and form as may be prescribed by Rules of Court, and on such terms as the Court or Judge shall think just, and shall make such order for the disposal of the action as may be just.

In case of an assignment, creation, or devolution of any estate or title pendente lite, the action may be continued by or against the person to or upon whom such estate or title has come or devolved.

The first clause of this Rule is re-enacted by Order L., Rule 1,

Form of pleadings.

The following rules of pleading shall be substituted for those heretofore in force in the High Court of Chancery and in the Courts of Common Law, Equity, and Probate:—

As the defendant at the time of his appearance shall state that he desires the delivery of a statement of complaint, the plaintiff shall within seven days and in such manner as shall be prescribed by Rules of Court, file and deliver to the defendant after his appearance a printed statement of his claim and of the relief or remedy to which he claims to be entitled. The defendant shall within such time and in such manner as aforesaid file and deliver to the plaintiff a printed statement of his defence, set-off, or counterclaim (if any), and the plaintiff shall in like manner, file and deliver a printed statement of his reply (if any) to such defence, set-off or counterclaim. Such statements shall be as brief as the nature of the case will admit, and the Court sitting the costs of the action shall inquire at the instance of any party of unnecessary prolixity, and order the costs occasioned by such prolixity to be paid by the party chargeable with the same.

Amendment to any statement may be filed in such manner and form as may be prescribed by Rules of Court.

Court or a Judge may, at any stage of the proceedings, allow either party to alter his statement of claim or defence or reply, or may order to be struck out or amended any matter in such statements respecting which may be irrelevant, immaterial, or which may tend to prejudice, embarrass, or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties.

The first clause of this Rule is re-enacted by Order XIX., No. 1, of the Amending Act. The second clause is re-enacted by Order XIX., Rule 2 of that Act. The fourth clause is

**Rules 1873,
Rule 19.**

between the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the Judge.

This Rule is re-enacted by Order XXVI. of the Amending Act.

Counterclaims by defendant.

20. *A defendant may set off, or set up, by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.*

This rule is re-enacted by Order XIX., Rule 3, of the Amending Act.

Power to give judgment for defendant for balance under counterclaim.

21. *Where in any action a set-off or counterclaim is established as defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or otherwise adjudge to the defendant such relief as he may be entitled to on the merits of the case.*

This Rule is re-enacted by Order XXII., Rule 10, of the Amending Act.

Joinder of several causes of action.

22. *Subject to any Rules of Court, the plaintiff may unite in the action and in the same statement of claim several causes of action, but if it appear to the Court or a Judge that any such causes of action cannot conveniently be tried or disposed of together, the Court or Judge may order separate trials of any of such causes of action to be had, or may make such other orders as may be necessary or expedient for the separate disposal thereof.*

This Rule is re-enacted by Order XVII., Rule 1 of the Amending Act.

[Joinder of defendants.]

23.* *It shall not be necessary that every defendant to any action be interested as to all the relief thereby prayed for, or as to every cause included therein; but the Court or a Judge may make such orders as may be necessary or expedient for the separate disposal thereof.*

* This Rule, like the 11th, has no marginal note in the

appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in such action in which he may have no interest.

**Rules 1873,
Rule 22.**

This Rule is re-enacted by Order XVI., Rule 4, of the Amending Act.

Power for Court to raise preliminary questions of law in an action.

24. If it appear to the Court or a Judge, either from the statement of claim or defence or reply or otherwise, that there is in any action a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a Referee or an Arbitrator, the Court or Judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or Judge may deem expedient, or as may be prescribed by Rules of Court, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.

This Rule is re-enacted by Order XXXIV., Rule 2, of the Amending Act.

DISCOVERY.

Right of discovery on interrogatories.

25. Subject to any Rules of Court, a plaintiff in any action shall be entitled to exhibit interrogatories to, and obtain discovery from, any defendant, and any defendant shall be entitled to exhibit interrogatories to, and obtain discovery from, a plaintiff or any other party. Any party shall be entitled to object to any interrogatory on the ground of irrelevancy, and the Court or a Judge, if not satisfied that such interrogatory is relevant to some issue in the cause, may allow such objection. No exceptions shall be taken to any answer, but the sufficiency or otherwise of any answer objected to as insufficient shall be determined by the Court or a Judge in a summary way.

The Court in adjusting the costs of the action shall at the instance of any party inquire or cause inquiry to be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing master or of the Court or Judge that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault.

This Rule is re-enacted, the third clause by Order XXXI., Rule 9, the fourth clause by Order XXXI., Rule 2, the first clause (substantially) by Order XXXI., Rule 1, and the second clause (substantially) by Order XXXI., Rule 5, of the Amending Act.

**Rules 1873,
Rule 26.**

Production of documents pleaded or proved.

26. Every party to an action or other proceeding shall be entitled, at or before or at the hearing thereof, by notice in writing, to give notice to other party, in whose pleadings or affidavits reference is made to any document to produce such document for the inspection of the party giving such notice or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to produce any such document in evidence on his behalf in such action or proceeding unless he shall satisfy the Court that such document relates only to the title, he being a defendant to the action, or that he had some other cause for not complying with such notice.

This Rule is re-enacted by Order XXXI., Rule 14, Amending Act.

Discovery as to Documents.

27. It shall be lawful for the Court or a Judge at any time during the pendency therein of any action or proceeding, to order the production to any party thereto, upon oath, of such of the documents in his possession or control relating to any matter in question in such suit or proceeding, as the Judge shall think right; and the Court may deal with such documents so produced, in such manner as shall appear just.

This Rule is re-enacted by Order XXXI., Rule 1, Amending Act.

PLACE OF TRIAL.

Place of Trial.

28. There shall be no local venue for the trial of any action, but a plaintiff proposes to have the action tried elsewhere than in Middlesex shall in his statement of claim name the county or place in which he proposes that the action shall be tried, and the action shall, unless a Judge otherwise orders, be tried in the county or place so named. Where no place is named in the statement of claim, the place of trial shall, unless otherwise orders, be the county of Middlesex. Any order of a Judge as to such place of trial, may be discharged or varied by a Divisional Court of the High Court.

This Rule is re-enacted by Order XXXVI., Rule 1, Amending Act.

List for trials in London and Middlesex.

29. The list or lists of actions for trial at the sittings in London and Middlesex respectively shall be prepared and the actions shall be allotted in such manner as may be prescribed by Rules of Court, without reference to the Division of the High Court to which such actions may be attached.

This Rule is re-enacted by Order XXXVI., Rule 16, of the Rules 1873, Rule 29.
 Amending Act.

MODE OF TRIAL.

Mode of trying actions.

20. *Actions shall be tried and heard either before a Judge or Judges, or before a Judge sitting with assessors, or before a Judge and Jury, or before an official or special Referee, with or without assessors.*

This Rule is re-enacted by Order XXXVI., Rule 2, of the Amending Act.

Notice of mode of trial to be given.

21. *The plaintiff may give notice of trial by any of the modes aforesaid, but a defendant may, upon giving notice, within such time as may be fixed by rules of Court, that he desires to have any issues of fact tried before a Judge and Jury be entitled to have the same so tried, or he may apply to the Court or Judge for an order to have the action tried in any other of the said ways, and in such case the mode in which the action is to be tried or heard shall be determined by such Court or Judge.*

This Rule is (substantially) reproduced by Rules 2 and 4 of Order XXXI. of the Amending Act.

22. *Different questions arising in same action may be tried in different ways.*

23. *In any action the Court or a Judge may, at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, as that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials.*

This Rule is re-enacted by Order XXXVI., Rule 6, of the Amending Act.

Trials by Jury.

24. *Every trial of any question or issue of fact by a jury shall be held before a single Judge, unless such trial be specially ordered to be held before two or more Judges.*

This Rule is re enacted by Order XXXVI., Rule 7, of the Amending Act.

Proceedings before an official Referee.

25. *Where any action or matter, or any question in an action or matter, is referred to a Referee, he may, subject to the order of the Court or a Judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any) which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the Court or a Judge, proceed*

**Rules 1873,
Rule 34.** *with the trial in open Court, de die in diem, in a similar manner tried by a jury.*

This Rule is re-enacted by Order XXXVI., Rule Amending Act.

Effect of decision of Referee.

35. *The Referee may, before the conclusion of any trial before his report under the reference made to him, submit any question as for the decision of the Court, or state any facts specially, with Court to draw inferences therefrom, and in any such case the order on such submission or statement shall be entered as the Court may think fit. The Court shall have power to require any explanation or reason from the Referee, and to remit the action or any part thereof for re-trial to the same or any other Referee.*

This Rule is re-enacted by Order XXXVI., Rule Amending Act.

EVIDENCE.

Mode of giving evidence at trials.

36. *In the absence of any agreement between the parties, as to the application of any Rules of the Court applicable to any particular class of cases, at the trial of any cause or at any assessment of damages, shall be viva voce and in open Court, but the Court or a Judge may at any time, on sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the trial, on such conditions as the Court or Judge may think reasonable. Any witness whose attendance in Court ought for some sufficient reason to be dispensed with, be examined by interrogatories or otherwise before the trial, or by a commissioner or examiner; provided that where it appears to the Court that the other party bona fide desires the production of a witness for examination, and that such witness can be produced, an order may be made authorising the evidence of such witness to be given by affidavit.*

This Rule is re-enacted by Order XXXVII., Rule Amending Act.

Evidence at interlocutory applications.

37. *Upon any interlocutory application evidence may be given by affidavit, but the Court or a Judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.*

This Rule is re-enacted by Order XXXVII., Rule Amending Act.

*Matter of affidavits.*Rules 1873,
Rule 38.

Sworn affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements of counsel, with the grounds thereof, may be admitted. The costs of affidavits which shall unnecessarily set forth matters of hearsay, or argument, or copies of or extracts from documents, shall be paid by the party making the same.

This rule is re-enacted by Order XXXVII., Rule 3, of the Judicature Act.

Admissions.

Any party to an action may give notice, by his own statement or otherwise, to admit the truth of the whole or any part of the case stated or in the statement of claim, defence, or reply of any other party. Any party may call upon the other party to admit any document, saving exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so refusing, whatever the result of the action may be, unless at the trial the Court certify that the refusal to admit was reasonable; and the costs of proving any document shall be allowed unless such notice be given where the omission to give the notice is, in the opinion of the Court, a saving of expenses.

The first clause of this Rule is re-enacted by Order XXXII., of the Amending Act; the second clause by Order XXXIII., Rule 2 of that Act.

The third clause of the Rule is copied *verbatim* from the Law Procedure Act, 1852, Section 117.

INTERLOCUTORY ORDERS AND DIRECTIONS.

Power for party to apply for order before termination of action.

Any party to an action may at any stage thereof apply to the Court for such order as he may, upon any admissions of fact in the case, be entitled to, without waiting for the determination of any other question between the parties.

This Rule is re-enacted by Order XL., Rule 11 (clause 1), of the Amending Act.

Power to transfer questions arising in actions.

The Lord Chancellor, with the concurrence of the Lord Chief Justice, may order any question of law or of fact which may arise in any matter to be transferred from any Judge to any other Judge, or to be heard by any other Judge of the said High Court, and may confer

**Rules 1873,
Rules 41.** *on such Judge power to deal with the whole or any part of the matter
controversy.*

This Rule is substantially reproduced by Order LL, Rule and 2, of the Amending Act.

Accounts and inquiries.

42. *The Court or a Judge may, at any stage of the proceedings in an action or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further inquiry sought for or some special matter to be tried, as to which it may be possible that the cause should proceed in the ordinary manner.*

This Rule is re-enacted by Order XXXIII. of the Amending Act.

Interim orders as to subject matter of litigation.

43. *When by any contract a prima facie case of liability is established, there is alleged as matter of defence a right to be relieved wholly or partly from such liability, the Court or a Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured.*

This Rule is re-enacted by Order LII., Rule 1, of the Amending Act.

Power to make orders for sale of goods.

44. *It shall be lawful for the Court or a Judge, on the application of any party to any action, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as to the Court or Judge may seem desirable, if any goods, wares, or merchandise which are the subject-matter of such action be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once.*

This Rule is re-enacted by Order LII., Rule 2, of the Amending Act.

Power for Court to make interim orders as to preservation or examination of property, examination of witnesses, &c.

45. *It shall be lawful for the Court or a Judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property, being the subject-matter of such action, and for all or any of the purposes aforesaid to authorise any person or persons to enter upon or into any land or building in the possession of any party to such action, and for all or any of such purposes aforesaid*

authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. The Court or a Judge may also, in all cases where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any action or other proceeding to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct.

**Rules 1873
Rule 45.**

This Rule is re-enacted, the first clause by Order LII., Rule 3, the second clause by Order XXXVII., Rule 4, of the Amending Act ("cause or matter" being substituted for "all cases").

Discontinuance of action.

46. The plaintiff may, at any time before receipt of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn. Such costs shall be taxed in the manner prescribed by Rules of Court, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this Rule otherwise provided, it shall not be competent for the plaintiff to withdraw the Record or discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a Judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counterclaim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave. Any judgment of nonsuit, unless the Court or a Judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; but in any case of mistake, surprise, or accident, any judgment of nonsuit may be set aside on such terms, as to payment of costs and otherwise, as to the Court or a Judge shall seem just.

This Rule is re-enacted, the last clause by Order XLI., Rule 6, the remainder by Order XXIII. of the Amending Act.

**Rules 1873,
Rule 47.**

COSTS.

Costs.

47. *Subject to the provisions of this Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity.*

This Rule is re-enacted by Order LV. of the Amending Act.

NEW TRIALS AND APPEALS.

Restrictions on new trials.

48. *A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such Court that such wrong or miscarriage affects parts only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only.*

This Rule is re-enacted by Order XXXIX., Rule 3, of the Amending Act.

Abolition of bills of exceptions and proceedings in error.

49. *Bills of exceptions and proceedings in error shall be abolished.*

This Rule is re-enacted by Order LVIII., Rule 1, of the Amending Act.

Mode of Appealing.

50. *All appeals to the Court of Appeal shall be by way of re-hearing, and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part.*

This Rule is re-enacted by Order LVIII., Rule 2, of the Amending Act.

Notice of appeal.

51. *The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a*

party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may seem just, and may give such judgment and make such order as might have been given or made if the person served with such notice had been originally parties. Any notice of appeal may be amended at any time as to the Court of Appeal may seem fit.

**Rules 1873,
Rule 51.**

This Rule is re-enacted by Order LVIII., Rule 3, of the Amending Act.

General power of Appeal Court.

52. *The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of First Instance, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or Commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a decree or judgment upon the merits, at the trial or hearing of any action or matter, such further evidence (save as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court. The Court of Appeal shall have power to give any judgment and make any decree or order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said Court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. The Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal as may seem just.*

This Rule is re-enacted by Order LVIII., Rule 5, of the Amending Act.

Regulations as to cross appeals.

53. *It shall not, under any circumstance, be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied or altered, he shall, within such time as may be prescribed by Rules of Court or by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers by this Act conferred upon*

**Rules 1873,
Rule 53.**

the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs.

This Rule is re-enacted by Order LVIII, Rule 6, of the Amending Act.

Mode of bringing evidence before Court of Appeal.

54. *When any question of fact is involved in an appeal, the evidence taken in the Court below shall be brought before the Court of Appeal in such manner as may be prescribed by Rules of Court or by special order.*

This Rule is re-enacted (with the exception of the words, "in such manner as may be prescribed by Rules of Court or by special order") by Order LVIII, Rule 11 of the Amending Act. The "manner" is laid down in subsection (a) and (b) of the last-mentioned Rule.

Power for Court to refer to notes, &c.

55. *If, upon the hearing of an appeal, a question arises as to the ruling or direction of the Judge to a jury or assessors, the Court shall have regard to verified notes or other evidence, and to such other materials as the Court may deem expedient.*

This Rule is re-enacted by Order LVIII, Rule 13, of the Amending Act.

Want of appeal from interlocutory order not to limit powers of Court of Appeal.

56. *No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may seem just.*

This Rule is re-enacted by Order LVIII, Rule 14, of the Amending Act.

Limit of time in appeals.

57. *No appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. The said respective periods shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal, or from such time as may be prescribed by Rules of Court. Such deposit or other security for the costs to be occasioned by any appeal, shall be made or given as*

may be prescribed by Rules of Court, or directed under special circumstances by the Court of Appeal. **Rules 1873,
Rule 57.**

This Rule (except the words “or from such time as may be prescribed by Rules of Court”) is re-enacted by Order LVIII., Rule 15, of the Amending Act.

Appeal not to stay proceedings.

58. *An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any Judge thereof, or the Court of Appeal, may so order ; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct.*

This Rule is re-enacted by Order LVIII., Rule 16, of the Amending Act.

SUPREME COURT OF JUDICATURE ACT, 1875.

38 & 39 VICTORIA, CHAPTER 77.

Act 1875. An Act to amend and extend the Supreme Court
of Judicature Act, 1873.

[11th August, 1875.]

WHEREAS it is expedient to amend and
extend the Supreme Court of Judicature
Act, 1873.

A Bill was introduced in 1874, entitled "An Act to amend and extend the Supreme Court of Judicature Act, 1873." It passed through the House of Lords and was read a first time in the House of Commons, but it was withdrawn near the close of the Session of 1874, the chief cause of its withdrawal being the occupation of the time, which would otherwise have been devoted to it, by measures which were regarded as of more pressing importance, especially by the English Public Worship Bill, the Scottish Church Patronage Bill, and the Endowed Schools Bill, all of which eventually became law in the Session of 1874.

Instead of an amending measure a Suspensory Bill was passed (37 and 38 Vict. c. 83), by which the 2nd section of the Supreme Court of Judicature Act, 1873, was repealed, and it was provided that that Act, "excepting provisions thereof directed to take effect on the passing thereof," should "commence and come into operation on the 1st day of November, 1875," and the said day should "be taken to be the time appointed for the commencement of the said Act."

The preamble of the present Bill is copied from the preamble of the Amending Bill of 1874, with the omission of the concluding words, "and to constitute an IMPERIAL Appellate Court."

Be it therefore enacted by the Queen's most Act 1875.
 Excellent Majesty, by and with the advice and
 consent of the Lords Spiritual and Temporal, and
 Commons, in this present Parliament assembled,
 and by the authority of the same, as follows:

SECTION 1.—*Short title, and construction with
 36 and 37 Vict. c. 66.*

This Act shall, so far as is consistent with the
 tenor thereof, be construed as one with the
 Supreme Court of Judicature Act, 1873 (in this
 Act referred to as the Principal Act), and together
 with the Principal Act may be cited as "The
 Supreme Court of Judicature Acts, 1873 and
 1875," and this Act may be cited separately as
 "The Supreme Court of Judicature Act, 1875."

This section is copied from the Supreme Court of Judi-
 cature Bill of 1874, with the substitution of "1875" for
 "1874."

"The Supreme Court of Judicature Act, 1873," is the
 title, as we have seen,* given to the Principal Act by the
 1st section of that Act:

SECTION 2.—*Commencement of Act.*

This Act, except any provision thereof which is
 declared to take effect before the commencement
 of this Act, shall commence and come into opera-
 tion on the 1st day of November, 1875.

*Sections 20, 21, and 55 of the Principal Act shall not commence or come
 into operation until the 1st day of November, 1876, and until the said*

* Supreme Court of Judicature Act, 1873, section 1, *supra*.

Act 1875,
s. 2.

sections come into operation, an appeal may be brought to the House of Lords from any judgment or order of the Court of Appeal hereinafter mentioned in any case in which any appeal or error might now be brought to the House of Lords or to Her Majesty in Council from a similar judgment, decree, or order of any Court or Judge whose jurisdiction is by the Principal Act transferred to the High Court of Justice or the Court of Appeal, or in any case in which leave to appeal shall be given by the Court of Appeal.

The first paragraph of this section is copied from the Supreme Court of Judicature Bill, 1874. The words, "except any provision thereof which is declared to take effect before the commencement of this Act," refer to the following sections:* section 25 (which enacts that Orders in Council and Rules of Court, required by this Act to be laid before Parliament, shall be so laid within forty days next after they are made); section 29 (which abolishes certain small payments of the Senior Puisne Judge of the Queen's Bench and of the Queen's Coroner and Attorney); section 30 (which repeals section 16 of the Chancery Funds Act, 1872); section 31 (which abolishes the office of secretary to the visitors of lunatics), and section 32 (which amends section 19 of the 32 and 33 Vict. c. 83, and section 116 of the 32 and 33 Vict. c. 71). Sections 17, 23, and 26, also, give power to make orders after the passing and before the commencement of the present Act. See also s. 8 of this Act, *infra*.

The second paragraph of this section, which is of a suspensory and temporary nature, has been repealed by section 24 of the Appellate Jurisdiction Act, 1876.

The substituted provisions will be found in section 3 of that Act, by which "an appeal shall lie to the House of Lords from any order or judgment of Her Majesty's Court of Appeal," subject as therein mentioned.†

The effect of the latter part of the present section was rather curious. The jurisdiction of the High Court of Admiralty is, by the 5th subsection of the 16th section

* These sections came in force on the 11th of August, 1875.

† Subject, namely, to the fiat of the Attorney-General in cases under s. 10 of the Appellate Jurisdiction Act, 1876, and to the order of the House as to value, costs, and time under s. 11.

of the Principal Act, vested in the High Court of Justice. The appeal from the High Court of Admiralty lay direct to the Privy Council. The 5th subsection of the 18th section of the Principal Act vests this appellate jurisdiction of the Privy Council in the new Court of Appeal. Then comes the present section, which says that "an appeal may, till the 1st of November, 1876, be brought to the House of Lords *from any judgment or order of the Court of Appeal*, in any case in which an appeal might now be brought to Her Majesty in Council from a similar judgment or order" of the High Court of Admiralty, that being a "Court whose jurisdiction is transferred to the High Court of Justice." The words "from any judgment or order of the Court of Appeal," and the word "similar," would have been surplusage, unless it was intended to give two appeals, one to the Court of Appeal and one from that Court to the House of Lords, where, before the 1st of November, 1875, there was only one appeal, viz., to the Privy Council. See further, as to the meaning of the second paragraph of this section, the note to section 3 of the Appellate Jurisdiction Act, 1876, *infra*.*

Act 1875,
s. 2.

It may here be mentioned that, when sitting on appeal from the Admiralty Division of the High Court of Justice, the Court of Appeal has power to call in the aid of nautical assessors. As Lord Justice Baggallay pointed out in the case in which this was decided,† the power was expressly conferred upon the Court of Appeal by the Supreme Court of Judicature Act.‡ The expenses of the nautical assessors will have to be borne by the unsuccessful party, and may be recovered by the successful party as part of the costs.

During the interval which elapsed between the 1st of November, 1875, and the 1st of November, 1876, the House of Lords dealt with great freedom with the decisions of the Courts below. Besides reversing or varying the decisions of the Lords Justices of Appeal in Chancery,

* See also a correspondence on this subject in *The Times*, October 29th, and November 1st, 1875, between "E.R." and the writer of this work.

† *The "Dunkeld,"* W. N., 1876, 66, 100; *Times*, February 9th and 29th, 1876; 2 Charley's Cases (Court), 145, 147.

‡ Supreme Court of Judicature Act, 1873, s. 56, and Hansard's Parliamentary Debates, 3rd Series, Vol. 225, pp. 971, 972.

Act 1875,
s. 2.

and restoring the decisions of the Vice-Chancellors in the cases of *Syers v. Syers*,* *Edwards v. Warden*,† *Minors v. Battison*,‡ and *Lyon v. The Fishmongers' Company*,§ reversing the decisions of the Exchequer Chamber and restoring the decisions of the Queen's Bench, Common Pleas, and Exchequer, in the cases of *Allison v. The British Marine Insurance Company*,|| *Rhodes v. Forwood*,¶ *Louis v. Telford*,** and *Green v. The Queen*;†† and reversing the decision of the Court of Session in the case of *Harrison v. The Anderson Foundry Company*,‡‡ the House of Lords, during this interval of suspense, reversed the decision of the new Court of Appeal and restored the decision of the Queen's Bench in the important case of *Dixon v. The London Small Arms Company*.§§ In each of these cases there were the decisions of two Courts, the Court of First Instance and the House of Lords, as against the decision of one Court only, the Intermediate Court of Appeal; if the Intermediate Court of Appeal had been the Final Court of Appeal, the decisions would have been those of one Court, as against one Court; and substantial injustice would have been done to suitors, as in each case the decision of the Court of First Instance, which, after a most severe sifting before the most trained and judicial minds of the kingdom, was shown to have been right, would have been finally and irrevocably held to have been wrong. This will serve as an illustration of the advantages which have accrued to suitors from the preservation of the jurisdiction of the House of Lords as a Final Court of Appeal for the United Kingdom.

A number of important points relative to appeals to the House of Lords were decided during the interval between the 1st of November, 1875, and the 1st of November, 1876, in the case of *Justice v. The Mersey Steel and Iron Company*.|| The practice with regard to appeals to the House

* 1 App. Cas., 174, 192; 35 L. T., 101. † *Ib.*, 281, 305; 35 L. T., 1.

‡ *Ib.*, 428, 454. § *Ib.*, 662, 685; 25 W. R., 165.

|| *Ib.*, 209, 255; 24 W. R., 1059; 34 L. T., 809.

¶ *Ib.*, 256, 277; 24 W. R., 1078. ** *Ib.*, 414, 427; 45 L. J. (Ex.), 613.

†† *Ib.*, 513, 553. ‡‡ *Ib.*, 574, 594.

§§ *Ib.*, 632, 660; 25 W. R., 142; *Times*, Wednesday, July 12th, 1876.

|| 1 C. P. D., 575; 24 W. R., 955; W. N., 1876, p. 231.

Act 1875,
s. 2.

of Lords is untouched by the Supreme Court of Judicature Acts, and the Rules of the Supreme Court. Bail in error, as provided by s. 151 of the Common Law Procedure Act, 1852, must, therefore, be given by the appellant, on an appeal from a decision of the Court of Appeal, in an action commenced in one of the Common Law Divisions of the High Court. Order LVIII., Rule 16, of the Supreme Court has no application to appeals from the Court of Appeal to the House of Lords; it applies only to appeals from the High Court of Justice to the Court of Appeal. A Divisional Court of the High Court has power in an appeal to the House of Lords from the Court of Appeal to extend the time for putting in bail in error, where the four days (specified in the 151st section of the Common Law Procedure Act) for giving bail in error have expired; but the Court of Appeal has no such power. The reason is, that as soon as the Court of Appeal has given its decision in an appeal, it is *functus officio*; the action is put back into the High Court, and the judgment of the Court of Appeal becomes the judgment of the High Court, on which, and not on the Court of Appeal, devolves the duty of giving effect to it.

It was also decided, during the interval which elapsed between the 1st of November, 1875, and the 1st of November, 1876, that the new Court of Appeal has no jurisdiction to order the enrolment of a decree of the Court of Chancery, enrolled for the purpose of appealing to the House of Lords previous to the 1st of November, 1875, to be vacated. The power to make such an order is now vested exclusively in the Lord Chancellor.* See and compare *Bruff v. Cobbold*.†

SECTION 3.—*Explanation of 36 and 37 Vict., c. 66, s. 5, as to number of Judges.*

Whereas by section 5 of the Principal Act it is provided as follows:—
“that if at the commencement of this Act the number of Puisne Justices and
“ Junior Barons who shall become Judges of the said High Court shall exceed
“ twelve in the whole, no new Judge of the said High Court shall be appointed

* *Allan v. The United Kingdom Telegraph Company, Limited*, 24 W. R., 898; 2 Charley's Cases (Court), 10.

† L. R., 7 Ch., 217.

**Act 1875,
s. 3.**

“in the place of any such Puisne Justice or Junior Baron who shall die or resign while such whole number shall exceed twelve, it being intended that the permanent number of Judges of the said High Court shall not exceed twenty-one; and, “whereas, having regard to the state of business in the several Courts whose jurisdiction is transferred by the Principal Act to the High Court of Justice, it is expedient that the number of Judges thereof should not at present be reduced: Be it enacted, that so much of the said section as is hereinbefore recited shall be repealed. The Lord Chancellor shall not be deemed to be a permanent Judge of [the High] Court, and the provisions of section [5 of the Principal Act] relating to the appointment and style of the Judges of the said High Court shall not apply to the Lord Chancellor.

See the note to section 5 of the Principal Act, as to two curious *errata* in that section, which this section was originally designed to amend.

The manner in which it was intended to amend s. 5 will appear from the shape in which clause 3 came down from the House of Lords. It then ran thus:

“Whereas by section 5 of the Principal Act it is provided as follows:—‘that if at the commencement of this Act the number of Puisne Justices and Junior Barons who shall become Judges of the said High Court shall exceed twelve in the whole, no new Judge of the said High Court shall be appointed in the place of any such Puisne Justice or Junior Baron who shall die or resign while such whole number shall exceed twelve, it being intended that the permanent number of Judges of the said High Court shall not exceed twenty-one;’ and doubts have arisen as to the position of the Lord Chancellor under the said section, and it is expedient to remove such doubts:

“Be it therefore enacted, that the said section shall be read as if, instead of the words, ‘the permanent number of Judges of the said High Court,’ there were inserted the words, ‘the number of permanent Judges of the said High Court,’ and in the construction of the said section the Lord Chancellor shall be deemed not to be a permanent Judge of the said High Court, but the other Judges constituting the said High Court, exclusive of the Lord Chancellor, shall be deemed to be permanent Judges of that

Court, and the provisions of the said section relating to the appointment and style of the Judges of the said High Court shall not apply to the Lord Chancellor."

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In Committee on the Bill the consideration of clause 3 was postponed till after that of the other clauses.

Eventually Sir R. Baggallay, Q.C., A.G., on behalf of the Government, proposed and carried the following amendment to the clause :—

Leave out from "and doubtshave arisen," down to "exclusive of," and insert "Whereas, HAVING REGARD TO THE STATE OF BUSINESS in the several Courts whose jurisdiction is transferred by the Principal Act to the High Court of Justice, it is expedient that the number of Judges thereof should not at present be reduced: Be it enacted, that so much of the said section as is hereinbefore recited shall be repealed." Also, after the word "shall," and before the word "be," insert "not," before "permanent" insert "a," and alter "Judges" into "Judge."

With the exception of Mr. Gladstone and Sir William Harcourt, Q.C., the hon. members who spoke in the debates on the Bill were unanimous in deprecating any reduction in the number of the Judges, as contemplated by the repealed paragraph of section 5 of the Principal Act; and no one was more energetic in resisting the proposed reduction than Sir Henry James, Q.C.* In the debates on the Appellate Jurisdiction Bill in 1876, he succeeded, however, in persuading Sir John Holker, Q.C., A.G., to accept amendments in Committee on that Bill in the House of Commons, which reduced the number of Puisne Judges of the Common Law Divisions from 15 to 12. The repealing portion of the present section is printed in italics, because it is suspended until the death or resignation of "any two of the paid Judges of the Judicial Committee of the Privy Council." (See sections 15 and 18 of the Appellate Jurisdiction Act, 1876, *infra*.) The Queen may then, "upon an address from both Houses of Parliament, representing that the state of business is such as to require the appointment of an additional Judge, fill up one of the vacancies

* "As far as he could throw any obstacle in the way of reducing the number of Common Law Judges from 18 to 15, he would do so." Hansard's Parliamentary Debates, 3rd Series, Vol. 225, p. 953.

Act 1875,
s. 3.

created by the transfer” of three Puisne Judges from the High Court of Justice to the Court of Appeal. Meanwhile, the number of Puisne Judges of the Common Law Divisions of the High Court of Justice will remain limited to 12, as provided by that portion of section 5 of the Principal Act, which this section purports to repeal.

By the Supreme Court of Judicature Act, 1877, addition is made of one Puisne Judge to the Chancery Division. Mr. Fry, Q.C., has been appointed under the Act.

SECTION 4.—*Constitution of Court of Appeal.*

Her Majesty’s Court of Appeal, in this Act and in the principal Act referred to as the Court of Appeal, shall be constituted as follows: There shall be five *ex-officio* Judges thereof, and also so many ordinary Judges, *not exceeding three at any one time* as Her Majesty shall from time to time appoint.

The *ex-officio* Judges shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer.

The first Ordinary Judges of the said Court shall be the present Lords Justices of Appeal in Chancery, and such one other person as Her Majesty may be pleased to appoint by Letter Patent. Such appointment may be made either before or after the commencement of this Act but if made before shall take effect at the commencement of the Act.

The Ordinary Judges of the Court of Appeal shall be styled “Justices of Appeal.”

The Lord Chancellor may by writing addressed to the President of any one or more of the following Divisions of the High Court of Justice, that is to say, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division, request the attendance at any time, except during the times of the spring or summer Circuits, of an Additional Judge from such Division, or Divisions (not being *ex-officio* Judge or Judges of the Court of Appeal) at the sittings of the Court of Appeal, and a Judge, to be selected by the Division from which his attendance is requested, shall attend accordingly. Act 1875.
s. 4.

Every Additional Judge, during the time that he attends the sittings of Her Majesty's Court of Appeal, shall have all the jurisdiction and powers of a Judge of the said Court of Appeal, but he shall not otherwise be deemed to be a Judge of the said Court, or to have ceased to be a Judge of the Division of the High Court of Justice to which he belongs.

Section 54 of the Principal Act is hereby repealed, and, instead thereof, the following enactment shall take effect:—No Judge of the said Court of Appeal shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself, or made by any Divisional Court of the High Court of which he was and is a member.

Whenever the office of an Ordinary Judge of the Court of Appeal becomes vacant, a new Judge

Act 1875,
s. 4.

may be appointed thereto by Her Majesty by Letters Patent.

The leading distinction between the Court of Appeal created by the Principal Act and the Court of Appeal created by this Act is as follows:—The Court of Appeal created by the Principal Act was to be, practically, the *sole* Court of Appeal for the British Empire (“the Imperial Court of Appeal,” as it is termed in the Amending Bill of 1874), while the Court of Appeal created by this Act is a much more modest tribunal, representing merely the abolished jurisdiction of the Court of Exchequer Chamber and of the Court of Appeal in Chancery—in other words, it is merely an Intermediate Court of Appeal for England. The House of Lords is the Final Court of Appeal for the United Kingdom, except in Ecclesiastical causes; and the Judicial Committee of the Privy Council is the Final Court of Appeal in Ecclesiastical causes, and also for our Colonial Empire and India.

It was proposed by the 21st and 55th sections of the Principal Act, that the Court of Appeal, which it created, should gradually absorb the jurisdiction of the Judicial Committee of the Privy Council; but this proposal was, as we have seen,* first suspended, and then repealed.

This section is substituted for section 6 of the Principal Act, which is repealed by section 33 of the present Act, and the second Schedule.

There is no section of the present Act which underwent more (and more rapid) changes than the section now under discussion.

As the section originally stood, the third paragraph ran as follows:—“The first Ordinary Judges of the said Court shall be the present Lords Justices of Appeal in Chancery, *such two of the salaried Judges of the Judicial Committee of Her Majesty’s Privy Council appointed under the Judicial Committee Act, 1871, as Her Majesty may, under the Royal Sign Manual appoint*, and such ONE other person as Her Majesty may be pleased to appoint by Letters Patent. Such appointment may be made either before or after the commencement of this Act, but if made before,

* Pages 1, 30, and 31, *supra*.

shall take effect at the commencement of the Act." The words in italics were omitted in Committee on the Bill in the House of Commons, on the motion of Mr. Gregory,* on the ground, first, that the "salaried Judges" of the Judicial Committee were members of a Final tribunal of appeal, and it would be unfair to degrade them by making them members of the Court of Appeal, now that it was to be, not a final, but an Intermediate Court of Appeal; and, secondly, that the efficiency of the Judicial Committee would be impaired by the removal of two of its "salaried Judges."

Act 1875,
s. 4.

The words, "THREE other persons," were, on the motion of Mr. Watkin Williams, Q.C.,† substituted for the words, "one other person," thus keeping up the total number of "five Ordinary Judges of Appeal" originally specified in the first paragraph of the present section.

The idea of transferring two of the salaried Judges of the Judicial Committee of the Privy Council to the Court of Appeal was, no doubt, taken from the repealed sixth section of the Principal Act, which provided, that "the first Ordinary Judges of the said Court shall be the existing Lords Justices of Appeal in Chancery, the existing salaried Judges of the Judicial Committee of Her Majesty's Privy Council appointed under 'the Judicial Committee Act, 1871,' and such three other persons as Her Majesty may be pleased to appoint by Letters Patent."

When the Bill was in Committee in the House of Commons, Sir Henry James, Q.C., made an effort to secure that the "three other persons" should be Common Law Judges from Westminster Hall, but the proposal was resisted by the then Attorney-General, and was not pressed.‡

The present section, when the Bill issued from Committee in the House of Commons, stood as follows § :—

"Her Majesty's Court of Appeal, in this Act and in the Principal Act referred to as the Court of Appeal, shall be constituted as follows : There shall be five *ex-officio* Judges

* Hansard's Parliamentary Debates, 3rd Series, Vol. 225, pp. 976-79.

† *Ibid.*, p. 679.

‡ *Ibid.*, pp. 979-83.

§ It stands thus in the Bill "as amended in Committee," printed on the motion of the writer.

Act 1875,
s. 4.

thereof, and also so many Ordinary Judges, not exceeding *FIVE* at any one time, as Her Majesty shall from time to time appoint.

“The *ex-officio* Judges shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer.

“The first Ordinary Judges of the said Court shall be the present Lord Justices of Appeal in Chancery, and such *THREE* other persons as Her Majesty may be pleased to appoint by Letters Patent. Such appointment may be made either before or after the commencement of this Act, but if made before, shall take effect at the commencement of the Act.

“The Ordinary Judges of the Court of Appeal shall be styled *LORDS* Justices of Appeal.

“Whenever the office of an Ordinary Judge of the Court of Appeal becomes vacant, a new Judge may be appointed thereto by Her Majesty by Letters Patent.

“*Provided that if any Puisne Judge of the Court of Queen's Bench or Common Pleas, or any Junior Baron of the Court of Exchequer, is before the commencement of the Principal Act appointed an Ordinary Judge of the Court of Appeal, a new Judge may forthwith be appointed in the place of such Puisne Judge or Junior Baron, such appointment to take effect at the commencement of the Principal Act.*

“*One or more of the Lords Justices of Appeal, if members of Her Majesty's Privy Council, shall, so far as may be necessary, and so far as the state of business in the Court of Appeal may admit, attend the sittings of the Judicial Committee.*”

On the Report, Sir R. Baggallay, Q.C., A.G., moved to insert the following new amendments, the main object of which was to reduce the number of Ordinary Judges of Appeal from five to three, and to supplement the scanty provision of Ordinary Judges by enabling the Lord Chancellor to request the attendance of “Additional Judges,” from the three Common Law and the Probate Divisions of the High Court:—

“Leave out ‘five’ in paragraph one, and insert ‘three.’

"Leave out 'Lords,'* in paragraph four, before 'Justices.'

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"In same paragraph, at end, after 'Appeal,' insert—

"'The Lord Chancellor may by writing addressed to the President of any one or more of the following Divisions of the High Court of Justice, that is to say, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce and Admiralty Division, request the attendance at any time, except during the times of the spring or summer Circuits, of an Additional Judge from such Division or Divisions (not being *ex-officio* Judge or Judges of the Court of Appeal) at the sittings of the Court of Appeal; and a Judge, to be selected by the Division from which his attendance is requested, shall attend accordingly.

"'Every Additional Judge, during the time that he attends the sitting of Her Majesty's Court of Appeal, shall have all the jurisdiction and powers of a Judge of the said Court of Appeal, but he shall not otherwise be deemed to be a Judge of the said Court, or to have ceased to be a Judge of the Division of the High Court of Justice to which he belongs.'

"Leave out from 'provided that' to 'Judicial Committee,' at end of clause."

Sir Henry James, Q.C., moved to amend the principal amendment by inserting the following words at the end, after "belongs":—

"Provided, that no Judge of the said Court of Appeal shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself, or made by any Divisional Court of the High Court of which he was himself a member."

Sir Eardley Wilmot moved to amend Sir Henry James's Amendment, by substituting the words "and is" for the word "himself."

* In section 6 of the Supreme Court of Judicature Act, 1873, it was provided that "the Ordinary Judges of the Court of Appeal shall be styled 'Lords Justices of Appeal.'" Sir R. Bagallay was himself the first to receive the ugly suffix of "J.A." By s. 4 of the Supreme Court of Judicature Act, 1877, "the Ordinary Judges of the Court of Appeal shall be styled Lords Justices of Appeal."

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s. 4.

All these amendments were accepted by the House.*

The Lords, on receiving back the Bill from the Committee, disagreed with the amendment of Mr. Watkin Williams. Q.C., to leave out "one" and insert "three," in the third paragraph of the clause, assigning as their "reason" that "one Judge is more consistent with the scheme, as altered, than three Judges." The amendment was inserted, it will be remembered, in Committee on the Bill; but on the Report the number of Ordinary Judges of Appeal had been reduced (in paragraph 1) to three from five. The word "three" (in paragraph three) then became an arithmetical blunder, as the two Lords Justices of Appeal, and "one other person to be appointed by Letters Patent," made up the three Ordinary Judges of Appeal fixed by paragraph one.

A curious result of the alterations made in this clause in the Lower House was the creation of "Additional," as well as "*ex-officio*" and "Ordinary" Judges of Appeal, thus, to some extent, carrying out the view which Lord Selborne, in 1873, embodied in section 6 of his enactment.

The House of Lords altered the phrasology of Sir Henry James's amendment to "section 54 of the Principal Act is hereby repealed, and instead thereof the following enactment shall take effect:—No Judge of the said Court of Appeal shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself, or made by any Divisional Court of the High Court of which he was and is a member." If the reader will compare this amendment with section 54 of the Principal Act, he will see that enactment has been adapted to the present section by leaving out the word "himself," and inserting instead "and is," as proposed by Sir Eardley Wilmot.

Shortly after the passing of the Supreme Court of Judicature Acts, the question was raised whether Brett, J., who was an "Additional Judge" under this section, could sit on appeal from a Divisional Court of the Common Pleas Division, composed of Lord Coleridge, C.J., Archi-

* Hansard's Parliamentary Debates, 3rd Series, Vol. 226, pp. 634-642.

bald, J., and Amphlett, B. The Court of Appeal held that he could.* Act 1875,
s. 4.

It is rather difficult to understand the dilemma on the horns of which Mellish, L.J., considered himself to be impaled. His Lordship is reported† to have said:—"There seem to be only two ways of giving sense to the section; either the words, 'and is' must be rejected, or else 'Divisional Court' must be read as 'Division.'" It seemed to his Lordship the "fittest" course to "reject" the words "and is." The decision in the case was a perfectly sound one, but the reasoning on which it was founded is sufficiently perilous. No Court, not even the House of Lords, is entitled to "reject" the express words of an Act of Parliament, and so, to legislate. If a remedy is needed, it is for the power which passed the Act to apply it. Under the Supreme Court of Judicature Act, 1873, section 6, the "Additional Judges" of the Court of Appeal were to be (amongst others) persons "*having held* the office of a Judge of Her Majesty's Supreme Court." Section 54 of the same Act provided that "No Judge of the Court of Appeal shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself, or made by any Divisional Court, of the High Court of which he *was* himself a member." The contingency of a Judge being *at the same time* a member of the Court of Appeal and a member of the Divisional Court from whose decision the appeal was brought to the Court of Appeal, could not possibly have arisen under section 6 of the Supreme Court of Judicature Act, 1873. But the Judge of the Court of Appeal might under that section *have held* previously to becoming a Judge of the Court of Appeal, the position of Judge of the High Court, and might *have sat* as a member of "the Divisional Court of the High Court," from whose decision the appeal was brought. Section 54 of the Act of 1873 precluded him, in such an event, from sitting on the appeal. Then came the present Act, which repealed the 6th section of the Principal Act,

* *Fisher v. The Val de Travers Asphalt Paving Company*, 1 C. P. D. 259; 45 L. J. (C. P.), 135; 24 W. R., 198; 1 Charley's Cases (Court), 68.

† 1 C. P. D., 259.

Act 1875,
s. 4.

and, as a consequence, the 54th section of that Act also, and provided in lieu of them the present section. The present section created an entirely new class of "Additional Judges" of the Court of Appeal. It became possible under the present section for a Judge to be *at the same time* a Judge of the Court of Appeal and a Judge of the Divisional Court of the High Court, from whose decision the appeal is brought. The present section, therefore, re-enacts the 54th section of the Principal Act, but with the addition of the words "and is" after "was." If the Judge of the Court of Appeal *was*, at the time when the decision appealed from was given, *and still is*, at a time when the appeal is heard, "a member of the Divisional Court of the High Court," from whose decision the appeal is brought, he is precluded by this section from sitting on the appeal. He may not have taken part in the decision of the Divisional Court of the High Court, but it is an appeal from a Court of which he "was and is a member," and the indecorum of a Judge forming *at the same time* part of the Court below and part of the Court above is avoided. The expression "Divisional Court of the High Court" is used deliberately, both in the 54th section of the Principal Act and in the present section, and not "Division," because to have used the expression "Division" would have extended the principle of the ineligibility of a Judge of the Court of Appeal, to sit on appeals, too far. To take the case of *Fisher v. The Val de Travers Asphaltic Paving Company*. It would have been absurd to have disqualified Mr. Justice Brett from sitting on the appeal in that case, merely because he was a member of the Common Pleas Division. The Common Pleas Division did not decide the case, but a Divisional Court of the High Court, wielding the functions of that Division, did decide it. One of the Judges of the Divisional Court was actually a Baron of the Exchequer. Any one of the three Judges of the Divisional Court by which the case was decided (Mr. Baron Amphlett, though not a member of the "*Division*" to which the cause was attached, quite as much as Lord Coleridge and Mr. Justice Archibald) would have been precluded by this section from sitting on the appeal, *even though he did not take part in the decision*,

if he *continued* to be a member of the same Divisional Court at the time that the appeal was heard.

Act 1875,
s. 4.

It ought to be remembered that a judge can sit only in one of two capacities: either alone or as a member of a "Divisional Court." If the appeal is from himself, whether sitting alone or as a member of a Divisional Court, this section disqualifies him from sitting on the appeal; but it goes further, for it says, that he is equally disqualified from sitting on the appeal, if at the time that the decision was given by the Divisional Court, he *was a member* of the Divisional Court (even although he did not take part in the decision), and *is still a member* of the same Divisional Court at the time that the appeal is heard.

The Court of Appeal has decided that the words "any judgment or order made by himself," do not apply to a case *tried by a jury*, unless the Judge has expressed an opinion at the trial, one way or the other, which has influenced their verdict. The mere fact of his having presided at the trial, without more, does not incapacitate him from sitting on the appeal. Even if he directed the verdict, he is not "within the spirit" of the present section, if he directed the verdict merely for the purpose of raising the point of law, without expressing any opinion one way or the other.*

Although the period during which the attendance of an Additional Judge is requested as expired, "such Judge shall attend the sittings of the Court of Appeal for the purpose of giving judgment, or otherwise, in relation to any case which may have been heard by the Court of Appeal during his attendance" at its sittings. Appellate Jurisdiction Act, 1876, s. 19.

The 15th section of the Appellate Jurisdiction Act, 1876, effects an important change in the present section. It repeals the words "not exceeding three at any one time," and enacts new provisions, as to which see the note to the 15th section of the Appellate Jurisdiction Act, 1876, *infra*.

* *Richardson v. The South Eastern Railway Company*, 1 C. P. D., 342; 24 W.R., 907. In that case Kelly, C.B., withdrew, on the hearing of the appeal, because he had expressed an opinion at the trial that a portion of the findings, which the plaintiff considered most material, was mere surplusage.

Act 1875,
s. 5.

SECTION 5.—*Tenure of office of Judges and oaths of office; Judges not to sit in the House of Commons.*

All the Judges of the High Court of Justice, and of the Court of Appeal respectively, with the exception of the Lord Chancellor, shall hold their offices as such Judges respectively during good behaviour, subject to a power of removal by Her Majesty, on an Address presented to Her Majesty by both Houses of Parliament. No Judge of either of the said Courts shall be capable of being elected to or of sitting in the House of Commons. Every person appointed after the passing of this Act to be Judge of either of the said Courts (other than the Lord Chancellor) when he enters on the execution of his office, shall take in the presence of the Lord Chancellor, the oath of allegiance, the judicial oath as defined by the Promissory Oaths Act, 1868. The oaths to be taken by the Lord Chancellor shall be the same as heretofore.

This section is substituted for section 9 of the Principal Act, which provided that the Judges should hold office "*for life*," instead of "*during good behaviour*"—*quamdiu se bene gesserint*, and omitted the words, "with the exception of the Lord Chancellor." The office of Lord Chancellor is created by the mere delivery of the Great Seal into his possession, without writ or patent. The office ceases when the Lord Chancellor delivers up the Great Seal, as he generally does whenever there is a change of ministry.

"During good behaviour."—By the statute 12 and 13 Wm. II. c. 3, (A.D. 1700,) it was provided, that "Judges' commissions be made *quamdiu se bene gesserint*;

but upon the Address of both Houses of Parliament it may be lawful to remove them." "To continue Judges in the enjoyment of their offices during their good behaviour notwithstanding any demise of the Crown," it was enacted by the 1 Geo. III. c. 23, s. 1, that "the commissions of Judges for the time being shall be, continue, and remain in full force during good behaviour, notwithstanding the demise of His Majesty (whom God long preserve), or any of his heirs and successors." By s. 2 it was provided that "it may be lawful for His Majesty, his heirs and successors, to remove any Judge or Judges upon the Address of both Houses of Parliament."*

Act 1875,
s. 5.

By the 32 and 33 Vict. c. 71, s. 69, officers of any Court having jurisdiction in Bankruptcy are disqualified from sitting in Parliament (see 1 and 2 Wm. IV. c. 56, s. 60). The Judge of the Admiralty Court is disqualified by the 3 and 4 Vict. c. 66 (see 20 and 21 Vict. c. 77, s. 10). The Judge of the Probate and Divorce Court was not, it is believed, ineligible,† prior to the present enactment; neither was the Master of the Rolls.‡ Previously to the present enactment there was no statutory enactment excluding the Judges from sitting in the House of Commons, but they were declared by the House of Commons itself on the 9th of November, 1605, to be ineligible, on the ground that they are the assistants of the House of Lords.§

The "oath of allegiance and the judicial oath" are thus "defined" by "the Promissory Oaths Act, 1868:—"

"The oath in this Act referred to as the oath of allegiance shall be in the form following, that is to say,

'I do swear that I will be faithful
'and bear true allegiance to Her Majesty Queen Victoria,
'her heirs and successors, according to law.

'So help me God.' "¶

* It is rather singular that in the present section Judges are said to be removable by Her Majesty only, without mentioning "her heirs and successors" as in the old Acts. When repealing s. 9 of the Principal Act and re-enacting it this omission might have been corrected.

† Rogers on Elections, p. 198, n. (m), 10th ed.

‡ Sir George Bowyer tried, but in vain, in Committee on the Bill to retain this privilege of the Master of the Rolls.

§ 4 Inst., 47; 1 Bl. Comm. 75; Com. Jour., 9th Nov., 1605.

¶ 31 and 32 Vict. c. 72.

¶ s. 2.

Act 1875,
s. 5.

“The oath in this Act referred to as the judicial oath shall be in the form following, that is to say,

‘I do swear that I will well and truly
‘serve our Sovereign Lady Queen Victoria in the office of
‘, and will do right to all manner of people after
‘the laws and usages of this realm, without fear or favour,
‘affection or ill-will. ‘So help me God.’”*

“The oath of allegiance and judicial oath shall be taken by each of the officers named in the second part of the said Schedule hereto as soon as may be after his acceptance of office, and such oaths shall be tendered and taken in manner in which the oaths required to be taken by such officer previously to the passing of this Act on entering his office would have been tendered and taken.”†

“If any officer specified in the Schedule hereto declines or neglects, when any oath required to be taken by him under this Act is duly tendered, to take such oath, he shall, if he has already entered on his office, vacate the same, and if he has not entered on the same, be disqualified from entering on the same; but no person shall be compelled, in respect of the same appointment to the same office, to take such oath or make such affirmation more times than one.”‡

The second part of the Schedule includes 24 names, 22 of which correspond with the list of names in s. 5 of the Principal Act, *supra*.

The oath of allegiance and the judicial oath are taken by the Lord Chancellor, as well as by the rest of the Judges mentioned in the Schedule. See s. 94 of this Act, *infra*.§

SECTION 6.—*Precedence of Judges.*

The Lord Chancellor shall be President of the Court of Appeal; the other *ex-officio* Judges of the Court of Appeal shall rank in the order of their present respective official precedence. The Ordinary Judges of the Court of Appeal, if not

* s. 4.

† s. 6.

‡ s. 7.

§ See 4 Inst., 88, for the oath of the Lord Chancellor in Lord Coke's time, cited by Mr. Wynne E. Baxter in his "Law and Practice of the Supreme Court," 1st Edn., p. 158.

entitled to precedence as Peers or Privy Coun- Act 1875,
s. 6.
cillors, shall rank according to the priority of
their respective appointments as such Judges.

The Judges of the High Court of Justice who are not also Judges of the Court of Appeal shall rank next after the Judges of the Court of Appeal, and, among themselves (subject to the provisions in the Principal Act contained as to existing Judges) according to the priority of their respective appointments.

This section is substituted for section 10 of the Principal Act, which is repealed by section 33 of this Act, and the second Schedule. The provisions of the 10th section of the Principal Act relative to the precedence of the "Additional Judges" are omitted. The provision that "the Lord Chancellor shall be President of the Court of Appeal" is taken from the repealed 6th section of the Principal Act.

The order of precedence of the *ex-officio* Judges is as follows :—*

1. The Lord Chancellor.
- 2 The Lord Chief Justice of England.
3. The Master of the Rolls.
4. The Lord Chief Justice of the Common Pleas.
5. The Lord Chief Baron.

The three additional Ordinary Judges of the Court of Appeal stand on the same footing, as to precedence, as the other Ordinary Judges of that Court.†

The new Chancery Judge has the same precedence as a Puisne Judge.‡

SECTION 7.—*Jurisdiction of Lords Justices in respect of Lunatics.*

Any jurisdiction usually vested in the Lords

* See the list in 2 Steph. Com., 614, n. (x). It is by Letters Patent, 9, 10, and 14 Jac. 1 (which see in Seld. Tit. of Hon., II. 5, 46; and 11, 3) that the present order was fixed. † Appellate Jurisdic. Act, 1876, s. 15.

‡ Supreme Court of Judicature Act, 1877, s. 3.

Act 1875,
s. 7.

Justices of Appeal in Chancery, or either of them, in relation to the persons and estates of idiots, lunatics, and persons of unsound mind, shall be exercised by such Judge or Judges of the High Court of Justice or Court of Appeal as may be intrusted by the Sign Manual of Her Majesty or Her successors with the care and commitment of the custody of such persons and estates; and all enactments referring to the Lords Justices as so intrusted shall be construed as if such Judge or Judges so intrusted had been named therein instead of such Lords Justices: Provided that each of the persons who may at the commencement of the Principal Act be Lords Justices of Appeal in Chancery shall, during such time as he continues to be a Judge of the Court of Appeal, and is intrusted as aforesaid, retain the jurisdiction vested in him in relation to such persons and estates as aforesaid.

By subsection 3 of section 17, it is enacted that "there shall not be transferred to, or vested in the High Court of Justice any jurisdiction usually vested in the Lord Chancellor or in the Lords Justices of Appeal in Chancery, or either of them, in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind."

This enactment is repealed as to successors of the then Lords Justices of Appeal in Chancery by the present section.

To save the jurisdiction in lunacy of the Lord Chancellor, Mr. Osborne Morgan, Q.C., proposed in Committee on the Bill in the House of Commons to insert the following additional proviso: "Provided also, that nothing herein contained shall affect the jurisdiction usually vested in the Lord Chancellor in relation to the persons and estates of idiots, lunatics, and persons of unsound mind." The then

Attorney-General, however, declined to accept the amendment, on the ground that the jurisdiction in lunacy of the Lord Chancellor is not touched by the present section, which is, in express terms, limited to the jurisdiction in lunacy of the Lords Justices of Appeal in Chancery.

Act 1875,
s. 7.

The office of Lord Justice of Appeal in Chancery was created in the autumn of 1851.* The Lunacy Regulation Act took effect on the 28th of October, 1853, and by its interpretation clause† it was enacted, that the expression, “the Lord Chancellor intrusted as aforesaid” (which frequently occurs in the Act) should be construed to mean “the Lord High Chancellor of Great Britain for the time being, intrusted, by virtue of the Queen’s Sign Manual, with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind; and when and *so long as* the Lords Justices of the Court of Appeal in Chancery for the time being shall be intrusted as aforesaid concurrently with the Lord Chancellor, then, and *so long*, the expression shall be construed to include, or be applicable to, the Lords Justices aforesaid, so that all the powers, authorities, and duties to be had, exercised, and performed under this Act by the Lord Chancellor intrusted as aforesaid shall, and may be had, exercised, and performed as well by the Lord Chancellor, sitting either alone or jointly with both or either of the Lords Justices, or by both of the Lords Justices aforesaid, acting jointly, apart from the Lord Chancellor.”

By the 13th section of the “Court of Chancery Officers Act, 1867,”‡ it is provided, that “all the jurisdiction, powers, authorities, and duties of the Lords Justices of the Court of Appeal in Chancery, under ‘The Lunacy Regulation Act, 1853,’ and under any other Act, as being intrusted, by virtue of the Queen’s Sign Manual, with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind, may be exercised and performed, not only by both of the Lords Justices jointly acting and sitting together, but also by either of them alone, acting or sitting separately.”

* By the stat. 14 & 15 Vict. c. 83.

† 16 & 17 Vict. c. 70, s. 2.

‡ 30 & 31 Vict. c. 87.

Act 1875,
s. 7.

By section 4 of the present Act, *supra*, it is enacted that two of the "first Ordinary Judges of the Court of Appeal shall be the present Lords Justices of Appeal in Chancery." The lamented death of Sir Geo. Mellish, L.J., occurred on June 15, 1877. On July 25, 1877, the Queen, under Her Sign Manual, placed all the Ordinary Judges of the Court of Appeal by name on the same footing with Sir W. M. James, L.J., as regarded the jurisdiction in Lunacy.

It was discovered in the case of *In Re Walton*,* which was a petition in lunacy, that the orders in lunacy had been made "In Chancery," as well as "In Lunacy," the Lords Justices, notwithstanding the express provisions of the section, had no longer any power to make them. To remedy this, the Lord Chancellor appointed Lords Justices James and Mellish additional members of the Chancery Division of the High Court, for the purpose of making orders in Lunacy.†

SECTION 8.—*Admiralty Judges and Registrars*

Whereas by section 11 of the Principal Act it is provided as follows: "Every existing Judge who is by this Act made a Judge of the High Court of Justice or an Ordinary Judge of the Court of Appeal shall, as to tenure of office, rank, title, salary, pension, patronage, and powers or appointment or dismissal, and all other privileges and disqualifications, remain in the same condition as if this Act had not passed; and, subject to the change effected in their jurisdiction and duties by or in pursuance of the provisions of this Act, each of the said existing Judges shall be capable of performing and liable to perform all duties which he would have

* *Times*, Nov. 8th, 1876; 1 Charley's Cases (Court), 57.

† *In Re Walton*, *Times*, Nov. 15th, 1876.

“ been capable of performing or liable to perform
 “ in pursuance of any Act of Parliament, law,
 “ or custom if this Act had not passed. No
 “ Judge appointed before the passing of this
 “ Act shall be required to act under any Commis-
 “ sion of Assize, Nisi Prius, Oyer and Terminer,
 “ or Gaol Delivery, unless he was so liable by usage
 “ or custom at the commencement of this Act :”

Act 1875,
 n. 8.

And whereas the Judge of the High Court of Admiralty is by the Principal Act appointed a Judge of the High Court of Justice :

And whereas such Judge is, as to salary and pension, inferior in position to the other Puisne Judges of the Superior Courts of Common Law, but holds certain ecclesiastical and other offices in addition to the office of Judge of the High Court of Admiralty :

And whereas it is expedient that such Judge, if he be willing to relinquish such other offices, should be placed in the same position as to rank, salary, and pension, as the other Puisne Judges of the Superior Courts of Common Law :

Be it enacted that—

If the existing Judge of the High Court of Admiralty* under his hand signifies to the Lord Chancellor in writing, before the commencement of the Principal Act, that he is willing to relinquish such other offices as aforesaid, and does, before the commencement of the Principal Act,

* The Right Hon. Sir Robert James Phillimore.

Act 1875,
s. 8.

resign all other offices of emolument held by him except the office of Judge of the High Court of Admiralty, he shall, from and after the commencement of the Principal Act, be entitled to the same rank, salary, and pension as if he had been appointed a Judge of the High Court of Justice immediately on the commencement of the Principal Act, with this addition, that in reckoning service for the purposes of his pension, his service as a Judge of the High Court of Admiralty shall be reckoned in the same manner as if the High Court of Justice had been established at the time of his accepting the office of Judge of the High Court of Admiralty, and he had continued from such time to be a Judge of the said High Court of Justice.

The present holder of the office of Registrar of Her Majesty in ecclesiastical and Admiralty causes,* shall, as respects any appeals in which he would otherwise be concerned coming within the cognizance of the Court of Appeal, be deemed to be an officer attached to the Supreme Court; and the office, so far as respects the duties in relation to such appeals as aforesaid, shall be deemed to be a separate office within the meaning of section seventy-seven of the Principal Act, and may be dealt with accordingly. He shall be entitled, in so far as he sustains any loss of emoluments by or in consequence of the Principal Act or this Act, to

* Mr. Rothery.

prefer a claim to the Treasury in the same manner as an officer paid out of fees whose emoluments are affected by the passing of the Principal Act is entitled to do under section 80 of the Principal Act.

Act 1875,
s. 8.

Subject as aforesaid, the person who is at the time of the passing of this Act Registrar of Her Majesty in Ecclesiastical and Admiralty Causes shall, notwithstanding anything in the Principal Act or this Act, have the same rank and hold his office upon the same tenure and upon the same terms and conditions as heretofore; but it shall be lawful for Her Majesty by Order in Council made upon the recommendation of the Lord Chancellor, with the concurrence of the Treasury, to make, notwithstanding anything contained in any Act of Parliament, such arrangements with respect to the duties of the said last-mentioned office, either by abolition thereof or otherwise, as to Her Majesty may seem expedient: Provided that such Order shall not take effect during the continuance in such office of the said person so being Registrar at the time of the passing of this Act without his assent.

Every Judge of the Probate, Divorce, and Admiralty Division of the said High Court of Justice appointed after the passing of this Act shall, so far as the state of business in the said Division will admit, share with the Judges mentioned in section 37 of the Principal Act the duty of holding sittings for trials by jury

Act 1875,
s. 8.

in London and Middlesex, and sittings under Commissions of Assize, Oyer and Terminer, and Gaol Delivery.

See the note to section 11 of the Principal Act. The section of the Principal Act by which the Judge of the High Court of Admiralty is made a Judge of the High Court of Justice is the 5th.

“Inferior in position.” The salary of the Judge of the High Court of Admiralty at the passing of the Act was £1,000 less, and his retiring pension £1,500 less than those of the Puisne Judges of the superior Courts of Common Law at Westminster. 2 & 3 Will. IV. c. 116; 3 & 4 Vict. c. 66, ss. 1 and 7.

The option given to Sir Robert Phillimore of resigning “certain ecclesiastical offices” had reference to the provision made for filling such offices by “The Public Worship Act, 1874,”* section 7 of which enacts, that “whenever a vacancy shall occur in the office of Official Principal of the Arches Court of Canterbury, the Judge, appointed by the Archbishops of Canterbury and York, under that Act,† “shall become, *ex-officio*, such Official Principal; and all proceedings thereafter taken before the Judge in relation to matters arising within the province of Canterbury shall be deemed to be taken in the Arches Court of Canterbury;‡ and whensoever a vacancy shall occur in the office of Master of the Faculties to the Archbishop of Canterbury, such Judge shall become, *ex-officio*, such Master of the Faculties.”

Sir Robert Phillimore was official principal of the Arches Court of Canterbury and Master of the Faculties to the Archbishop of Canterbury, as well as Judge of the High Court of Admiralty. He resigned before the 1st

* 37 & 38 Vict. c. 85.

† Lord Penzance.

‡ Lord Penzance, in the recent case of Mr. Tooth (*The Hatcham Case*, *Times*, Jan. 15th, 1877, thus vindicated his right, as the Dean of Arches to sit in judgment on Mr. Tooth, under that Act: “All that the Act has done is to arm the Court with new powers, and these only in the way of procedure. Can any reasonable man argue that the conferring of such powers as these, which did not alter the jurisdiction, annihilated altogether?”

of November, 1875, these offices, and Lord Penzance at once succeeded him under s. 7 of the Public Worship Act, 1874. Sir Robert, at the same time, in virtue of this act of self-abnegation, immediately became entitled to the same rank, salary, and pension as a Puisne Judge of the High Court of Justice.

Act 1875,
s. 8.

“Every Judge of the Probate, Divorce, and Admiralty Division.” The 37th section of the Principal Act only mentioned the “Judges of the Queen’s Bench, Common Pleas, and Exchequer Divisions of the High Court,” as available for performing “the duty” mentioned in the concluding paragraph of the present section.

SECTION 9.—*London Court of Bankruptcy not to be transferred to High Court of Justice.*

The London Court of Bankruptcy shall not be united or consolidated with the Supreme Court of Judicature, and the jurisdiction of that Court shall not be transferred under the Principal Act to the High Court of Justice, but shall continue the same in all respects as if such transfer had not been made by the Principal Act, and the Principal Act shall be construed as if such union, consolidation, and transfer had not been made: Provided that

- (1.) The office of Chief Judge in Bankruptcy shall be filled by such one of the Judges of the High Court of Justice appointed since the passing of the Bankruptcy Act, 1869, or, with his consent, of such one of the Judges appointed prior to the passing of the last-mentioned Act, as may be appointed by the Lord Chancellor to that office; and

Act 1875,
s. 9.

(2.) The appeal from the London Court of Bankruptcy shall lie to the Court of Appeal in accordance with the Principal Act.

As this section originally stood the words "from time to time" followed the word "shall," in the first subsection. These words were omitted in Committee on the Bill in the House of Commons,* on the motion of Mr. Herschell, Q.C., on the ground that they would give power to the Lord Chancellor "to set aside a Judge who might be displeasing to him and appoint another in his place."

The area of selection of Judges was confined by the present Bill to "Judges of the Exchequer Division of the High Court;" the words "of the Exchequer Division" were struck out in Committee on the Bill in the House of Commons,† on the motion of Mr. Osborne Morgan, Q.C., thus enlarging the area of selection.

(1.) This section, together with s. 33 and the Schedule to this Act, repeal subsection (8) of s. 16, and subsections (3) and (4) of clause 4 of section 34 of the principal Act. Allusions to the London Court of Bankruptcy in the Rules of Court drawn up in 1874 under the Principal Act, have been expunged in the amended edition of these Rules inserted in the first Schedule hereto.

(2.) The present section, it will be seen, does not affect the provision of subsection (1) of the 18th section of the Principal Act, that there shall be transferred to and vested in the Court of Appeal all jurisdiction and power of the Court of Appeal in Chancery as a Court of Appeal in Bankruptcy, under section 71 of the Bankruptcy Act, 1869.‡

The jurisdiction of the Court of Bankruptcy is, generally speaking, unaffected by the Supreme Court of Judicature Acts, but, where a question in an action cannot be tried in the Court of Bankruptcy, as in the case of proceedings by a defendant against a third party, under Order XVI.,

* July 5th, 1875. See *Times* of July 6.

† *Ibid.*

‡ See, as to this appeal, Roche and Hazlitt on Bankruptcy, 111-113.

Rule 17, the Court of Bankruptcy has no jurisdiction to restrain the action in the High Court.*

Act 1875,
s. 9.

SECTION 10.—*Amendment of 36 and 37 Vict. c. 66, s. 25, as to Rules of Law upon certain points.*

Whereas, by section twenty-five of the Principal Act, after [reciting that it is expedient to amend and declare the law to be thereafter administered in England as to the matters next thereafter mentioned, certain enactments are made with respect to the law, and it is expedient to amend the said section : Be it therefore enacted, as follows:—

Subsection one of clause twenty-five of the Principal Act is hereby repealed, and instead thereof the following enactment shall take effect ; (that is to say) in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unse-

* *In Re Collie*, 2 Ch. D., 51 ; 45 L. J. (Bkcy.), 116 ; 34 L. T., 603 ; 24 W. R., 310 ; 1 *Charley's Cases* (Court), 71 ; *Ex parte Ditton, In Re Woods*, 1 Ch. D., 557 ; 24 W. R., 289 ; 45 L. J. (Bkcy.), 87 ; 34 L. T., 109 ; 2 *Charley's Cases* (Court), 66.

Act 1875,
s. 10.

cured creditors, and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act.

In subsection seven of the said section the reference to the date of the passing of the Principal Act shall be deemed to refer to the date of the commencement of the Principal Act.

See the note to subsection (1) of section 25 of the Principal Act.

The law upon the subject-matter of the first subsection of this section will be found in the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71). See also Lee on Bankruptcy; Roche and Hazlitt on Bankruptcy; and Robson on Bankruptcy.

Lord Selborne, C., thus referred to the first subsection of this section in his opening remarks when introducing the Principal Act:—

“The first alteration is a rather important one. It is proposed that in the administration of insolvent estates by

the Court after the death of the debtor, substantially the rules applicable to bankruptcy shall be adopted. There seems to be no good reason why the estate of an insolvent debtor should be administered in one way while he is living, and in another way when he is dead.”*

Act 1875,
s. 10.

The rules of priority in the payment of debts by an executor or administrator are so strict, that if he pay those of a lower degree first, he must, on a deficiency of assets, answer those of a higher degree out of his own estate.†

These rules of priority may be stated as follows:—

The executor or administrator must pay—

1. Debts due to the Crown by record or speciality.
2. Debts to which particular statutes give priority, as in the case of an overseer of the poor, money due to the parish by him‡; in the case of any person formally and duly appointed an officer of a friendly society, money due by him to the society in virtue of his office§; in the case of the army, regimental debts||; in the case of a treasurer or collector to paving commissioners under the Metropolis Act, money collected by him and due to the Commissioners.¶

3. Debts of record, including—

- (1.) Judgments of Courts of Record,
- (2.) Decrees of Courts of Equity,
- (3.) Orders in Bankruptcy, and
- (4.) Recognisances and statutes merchant and staple.**

4. Debts (1) by speciality, as on bonds, covenants, and other instruments under seal, and (2) by simple contract.††

It is beyond the power of a testator to disappoint the rules of law as to the precedence of debts, by directing his executors to make an equal distribution of the assets among his creditors.‡‡ But if the assets in the hands of an executor are equitable, *i.e.*, assets such as can only be reached with

* Hansard's Parliamentary Debates, 3rd Series, vol. 214, p. 340.

† 2 Black Comm., 511.

‡ 17 Geo. II. c. 38, s. 3.

§ 18 & 19 Vict. c. 63, s. 23.

|| 26 & 27 Vict. c. 57.

¶ 57 Geo. III. c. 22, s. 51 (Local Act).

** 2 Stephon's Black., 202, 203, and William's Exors., part 3, b. 2, c. 2.

†† See 32 & 33 Vict. c. 46, under which (1) and (2) “shall be treated as standing in equal degree.” Prior to this speciality debts ranked before simple contract debts. (*Pinchon's Case*, 9 Co., 88 b).

‡‡ *Turner v. Cox*, 8 Mad., P. C., 288.

Act 1875,
s. 10.

the help of a Court of Equity, and cannot be brought forward in evidence on issue joined on an executor's plea of "*plene administravit*," the assets must be applied in satisfaction of the claims of all the creditors *pari passu*, without any regard to the priority in rank of one debt over another. The principle of this distinction is that in natural justice and conscience, and in the contemplation of a Court of Equity, all debts are equal, and the debtor is equally bound to satisfy them all. "Equality," in short, is, in the view of the Court of Chancery, "Equity."*

Under the law of Bankruptcy now in force,—“The Bankruptcy Act, 1869,”†—the rule of equity that all debts shall be paid *pari passu* is adopted with two exceptions. (1) “All parochial or other local rates due from the bankrupt at the date of the order of adjudication, and having become due and payable within twelve months next before such time; all assessed taxes, land tax, and property or income-tax, assessed or due up to the 5th day of April next before the date of the order of adjudication, and not exceeding in the whole one year's assessment; (2) all wages or salary of any clerk or servant in the employment of the bankrupt at the date of the order of adjudication, not exceeding four months' wages or salary, and not exceeding £50; all wages of any labourer or workman in the employment of the bankrupt at the date of the order of adjudication, and not exceeding two months' wages.” These debts are to be paid in priority to all other debts. Between themselves such debts rank equally, and are to be paid in full unless the property of the bankrupt is insufficient to meet them, in which case they abate in equal proportions between themselves.‡

“The respective rights of secured and unsecured creditors.” A “secured creditor” is defined by the Bankruptcy Act, 1869, to mean “any creditor holding any mortgage, charge, or lien on the bankrupt's estate, or any part thereof, as security for a debt due to him.”§ An unsecured creditor is, of course, any creditor not holding such security. Under the earlier bankrupt laws, no proof

* *Plunkett v. Penson*, 2, Atk., 294; Williams on Executors, part 4, bk. 1, ch. 1.

† 32 and 33 Vict. c. 71.

‡ *Ibid.*, s. 32.

§ *Ibid.*, s. 16, par. (5).

whatever was allowed to be made by a creditor who held a security for his debt on the bankrupt's estate.* But this was altered, first as to persons holding a legal mortgage, and afterwards as to all other incumbrances, and at the time of the passing of the Bankruptcy Act, 1869,† any creditor having a mortgage, charge, or lien on any part of the bankrupt's property, might either rest on his security and compel the assignees to redeem him, or he might apply to have his security realised under the direction of the Court, with leave to prove for any deficiency,‡ or if such creditor had power at law to sell the property comprised in his security he might release it by sale without applying to the Court, and then prove for the deficiency.§ But if the creditor proved for his whole debt, he, as a general rule, forfeited the benefit of his security.||

Act 1875,
s. 10.

The rights of creditors having a mortgage, charge, or lien on any part of the bankrupt's property are not materially altered by the Bankruptcy Act, 1869. Such creditors may still either rest on their securities and compel the trustee to redeem him, or they may realise their securities, or apply to have them realised under the direction of the Court, and prove for any deficiency.¶ A secured creditor may also give up his security and prove for his whole debt.**

“Debts and liabilities proveable.” By the 31st section of the Bankruptcy Act, 1869, all debts and liabilities, present or future, vested or contingent (except demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise), to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the con-

* *Ex parte McTurk*, 3 M. & A., 4.

† Lord Loughborough's Order, 8th March, 1792; G. O., 1852, Rs. 56, *et seq.*

‡ G. O. 1852, Rs. 55, *et seq.*

§ *Ex parte Geller*, 2 Mad., 266; *Ex parte Rolfe*, 3 M. & A., 311; *Ex parte Johnson*, 3 D. M. & G., 218; *Ex parte Sheppard*, 2 M. D. & D., 431; *Ex parte Moffat*, 1 M. D. & D., 282.

|| *Ex parte Doucnes*, 1 Rose, 96; *Ex parte Eggington*, Mont., 72; *Ex parte Solomon*, 1 G. & J., 25; *Ex parte Hornby*, Buck, 351.

¶ 32 & 33 Vict. c. 71, s. 12. Rules 78, *et seq.*, 1870. See *White v. Simmons*, 40 L. J. (Ch), 689; 6 Ch. App., 533; 19 W. R., 939.

** 32 & 33 Vict. c. 71, s. 40.

Act 1875,
s. 10.

tinuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, are to be deemed to be "debts proveable in bankruptcy," and may be proved in the prescribed manner before the trustee in bankruptcy. The term "liability," for the purposes of the Act, includes any compensation for work, or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether such breach does or does not occur, and is or is not likely to occur, or capable of occurring before the close of the bankruptcy; and, generally it includes any express or implied engagement, agreement, or undertaking to pay, and capable in resulting in the payment of money or money's worth, whether such payment be as respects amounts fixed or liquidated, as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies, as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury, or as a matter of opinion. "The language of the Act," observes Mr. Robson, "as to admissibility to proof, is so comprehensive as to make it very difficult to say what debts or liabilities existing at the date of the order of adjudication will not be proveable."*

"Valuation of Annuities." The 175th section of the Bankruptcy Act, 1849,† provides that any annuity creditor of a bankrupt, by whatever assurance the annuity may be secured, or whether there were or not any arrears of such annuity due at the date of the petition for adjudication, shall be entitled to prove for the value of such annuity, which the Court shall ascertain, regard being had to the original price given for such annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof, to the date of the filing of the petition in bankruptcy.

The Bankruptcy Act, 1869, does not contain anything relating to proof in respect of annuities. The 175th section of the Act of 1849 would, therefore, seem to be still applicable.

* Robson on Bankruptcy, 2nd edit., p. 185. † 12 & 13 Vict. c. 106.

"Valuation of Future or Contingent* Liabilities." The section of the Bankruptcy Act, 1869, provides that an estimate shall be made, according to the Rules of Court for the time being in force, as far as the same may be applicable, and when they are not applicable, in the discretion of the trustee, of the value of any debt or liability proveable in bankruptcy, which, by reason of being subject to any contingency or contingencies, or for any other reason, does not bear a certain value. Any person aggrieved by any estimate made by the trustee may appeal to the Court, and the Court may, if it thinks the value of the debt or liability incapable of being fairly estimated, make an order to that effect, and upon such order being made, such debt or liability shall for the purposes of that Act, be deemed to be a debt not proveable in bankruptcy; but if the Court thinks that the value of the debt or liability is capable of being fairly estimated, it may direct such value to be assessed, with the consent of all the parties interested, before the Court itself, without the intervention of a jury, or, if such parties do not consent, by a jury, either before the Court itself or some other competent Court, and may give all necessary directions for the purpose, and the amount of such value, when assessed, shall be proveable as a debt under the bankruptcy.

Act 1875,
s. 10.

The effect of the amendment of subsection (1) of section 25 of the Principal Act, by this section, is to make the rules of bankruptcy "as to the respective rights of secured and unsecured creditors, and as to debts and liabilities proveable, and as to the valuation of annuities and future or contingent liabilities respectively, applicable to the winding up, under the Companies Acts, 1862 and 1867, of companies whose assets may prove to be insufficient, as well as in the administration by the Court of the assets of persons whose estate may prove to be insufficient.

It will be perceived, on comparing the substituted provisions with those of the repealed subsection, that the words "after the commencement of this Act" are substituted for "after the passing of this Act." Subsection

* See *In Re the Westbourne Grove Drapery Company*, 12 N.C., 66; W.N., 1877, p. 65; 25 W.R., 509.

Act 1875,
s. 10.

(1) of section 25 of the Principal Act in its unamended form applied, it is apprehended, to the administration by the Court of the assets of any person who died after the passing and before the commencement of the Principal Act, *i.e.*, between the 5th of August, 1873, and the 1st of November, 1875. The repeal is not retrospective, and therefore, as the present section did not come into operation until the 1st of November, 1875, the Principal Act could not be affected by it until then. Since the 1st of November, 1875, subsection (1), of the 25th section of the Principal Act, only applies to the administration of the assets of persons who die after that date.

In subsection (7) of s. 26 of the Principal Act, there was supposed to be a somewhat similar slip to that in subsection (1). The present section attempts to cure it; but it is apprehended that the subsection does not stand in need of any cure. It provides that stipulations in contracts as to time or otherwise which would not before the *passing* of the Act (*i.e.*, before the 5th of August, 1873) have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in Equity. The expression "passing of this Act," in this subsection, only fixes the time at which the particular construction was received in Equity, and does *not* say that it shall receive the same construction in other Courts at and from that time, *i.e.*, the 5th August, 1873. The only effect of the amendment introduced into subsection (7) of the Principal Act by the present section is to fix the 1st of November, 1875, as the date at which the particular construction was received in Equity, and as the particular construction received in Equity then was the same as that which was received in Equity on the 5th of August, 1873, the attempt to amend subsection (7) of the Principal Act was, it is submitted, unnecessary.

It will be seen that, as regards the administration of the assets of insolvents, the section only applies to the case of a person "dying after the commencement of this Act." There is no analogous limitation, as regards companies, to companies in liquidation after the commencement of this Act.

The Master of the Rolls, however, shortly after the commencement of the Act decided that the creditors of a Company who hold securities, and whose claims have been ascertained in a winding-up before the 1st of November, 1875, are entitled to prove for the full amount of their debts without deducting the value of their securities.*

Act 1875,
s. 10.

In short, it may be broadly laid down that the present section has no application whatever to companies which were already in liquidation before the 1st November, 1875.†

In bankruptcy the secured creditor is not put to his election until the time comes for him to prove his debt; and the same rule is now to prevail in the winding-up of companies in Chancery.‡

Where a Chancery suit was commenced by equitable mortgagees to establish their charge, and also seeking an administration of the estate in the case of deficiency, and a creditor's suit for the administration of the estate was subsequently commenced and a decree made in it for the usual accounts and enquiries, Bacon, V.C., stayed, at the instance of the defendant in both suits, all proceedings in the first action, and, at the instance of the plaintiffs in the first suit, gave the conduct of the decree to them.§

Malins, V.C., has decided that this section did not assimilate the Chancery to the Bankruptcy rule in the winding-up of a company, to the extent of enabling the lessor of the company to distrain, under s. 34 of the Bankruptcy Act, 1869 (32 and 33 Vict. c. 71), for a year's arrears of rent.||

See also on this section *In Re The Compagnie Générale de Bellegarde, Campbell's Case*.¶

SECTION 11.—*Provision as to option for any Plaintiff (subject to Rules) to choose in what*

* *Re the Phoenix Bessemer Steel Company, Limited*, 45 L. J. (Ch.), 11; 33 L. T., 403; 24 W. R., 19; 1 Charley's Cases (Court), 73.

† *In Re Joseph Suche and Company, Limited*, 1 Ch., 38; 45 L. J. (Ch.), 12; 33 L. T., 774; 24 W. R., 184; 1 Charley's Cases (Court), 77.

‡ *In Re the Carmarthen Anthracite Coal and Iron Company, Limited*, 45 L. J. (Ch.), 200; 24 W. R., 109; 1 Charley's Cases (Court), 79.

§ *Willyams v. Matthews; Matthews v. Matthews*, 45 L. J. (Ch.), 711; 34 L. T., 718; 2 Charley's Cases (Court), 149.

|| *In Re the Coal Consumers Company*, 4 Ch. D., 625; 35 L. T., 729; 25 W. R., 300.

¶ 4 Ch. D., 470.

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s. 11.

Division he will sue,—in substitution for 36 and 37 Vict. c. 66, s. 35.

Subject to any Rules of Court and to the provisions of the Principal Act and this Act and to the power of transfer, every person by whom any cause or matter may be commenced in the said High Court of Justice shall assign such cause or matter to one of the Divisions of the said High Court as he may think fit, by marking the document by which the same is commenced with the name of such Division, and giving notice thereof to the proper officer of the Court: Provided, that

- (1.) All interlocutory and other steps and proceedings in or before the said High Court in any cause or matter subsequent to the commencement thereof, shall be taken (subject to any Rules of Court and to the power of transfer) in the Division of the said High Court to which such cause or matter is for the time being attached: and
- (2.) If any plaintiff, or petitioner,* shall at any time assign his cause or matter to any Division of the said High Court to which, according to the Rules of Court or the provisions of the Principal Act or this Act, the same ought not to be assigned, the Court, or any Judge of such Division, upon being informed thereof, may, on a summary

* See the Interpretation Clause of the Principal Act (s. 106), *supra*.

application at any stage of the cause or matter, direct the same to be transferred to the Division of the said Court to which, according to such Rules or provisions, the same ought to have been assigned, or he may, if he think it expedient so to do, retain the same in the Division in which the same was commenced; and all steps and proceedings whatsoever taken by the plaintiff or petitioner, or by any other party in any such cause or matter, and all orders made therein by the Court or any Judge thereof before any such transfer shall be valid and effectual to all intents and purposes in the same manner as if the same respectively had been taken and made in the proper Division of the said Court to which such cause or matter ought to have been assigned; and

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- (3.) Subject to Rules of Court, a person commencing any cause or matter shall not assign the same to the Probate, Divorce, and Admiralty Division unless he would have been entitled to commence the same in the Court of Probate, or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, if this Act had not passed.

The present section is substituted for section 35 of the Principal Act, which is repealed by this Act (section 33, and the second Schedule). The whole of section 35 of the

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Principal Act is re-enacted *verbatim* by the present section, subsection (3) being added to it, in order to obviate the inconvenience which might have arisen from plaintiffs "assigning causes" in the first instance to the Probate, Divorce, and Admiralty Divisions, although wholly unsuited to be tried there. (By Order V., Rule 4, of the Rules of the Supreme Court, causes common to the Court of Admiralty and the other Courts may be assigned to any Division.)

The "notice to the proper officer" of the assignment of an action to any Division under this section will be sufficiently given by leaving with him a copy of the writ of summons. (Order V., Rule 9, of the Rules of the Supreme Court).

Cases illustrative of the power of transfer have already been cited under sect. 36 of the Principal Act. See the note to that section, *supra*.

The defence to an action on a deed being that the deed was void in equity and ought to be set aside on the ground of undue influence, the action was transferred by Archibald, J., at chambers, to the Chancery Division.*

An order having been made in a Chancery suit that "the defendant should take no proceedings at law," an action at law brought by the defendant, as indorsee of a dishonoured bill of exchange, against the plaintiff in the Chancery suit, was transferred by Lindley, J., at chambers, to the Chancery Division.†

A transfer was ordered by the Master of the Rolls of an action of salvage, wrongly assigned by the plaintiff to the Chancery Division, to the Probate, Divorce and Admiralty Division.‡ Counsel for the plaintiffs argued that as the action was one for the distribution of the amount which might be found to be due among the salvors, it might properly be entertained by the Chancery Division. The Master of the Rolls, however, held that it was about as ordinary an action for salvage as could well be. He also pointed out the distinction between subsection (2) of the present section and Order I.I., Rule 2, of the Rules of the Supreme Court. The latter leaves it to the discretion of the Judge whether he will order the transfer or not; under the

* *Padwick v. Scott*, 2 Charley's Cases (Chambers), 10.

† *Johnson v. Moffat*, 2 Charley's Cases (Chambers), 11.

‡ *Humphreys v. Edwards*, 45 L. J. (Ch.), 112; 10 N.C., 161; W.N., 1875, 208; 1 Charley's Cases (Court), 81.

former, the only cause of transfer is the fact of the action itself properly belonging to the Division to which it is sought to transfer it. No mention is made also in the 2nd subsection of the present section of the consent of the President of the Division to which it is proposed to transfer the cause. Under Order LI., Rule 2, of the Rules of the Supreme Court, no actual transfer can take place without the consent of the President of the Division to which the cause is sent. The Master of the Rolls also decided, in *Humphreys v. Edwards*, that motions for the transfer of causes from one Division to another should be made on notice.*

Act 1875,
s. 11.

The Lord Chancellor will direct the transfer of any action from one Judge to another of the Chancery Division on a written application to his Secretary, accompanied by the written *consent* of all parties. Where all parties do *not consent* the application must be made to the Lord Chancellor in Court.†

Any Judge of the Queen's Bench, Common Pleas, or Exchequer Division, sitting at chambers, has power to transfer (with the consent of the Lord Chancellor) an action commenced in the Queen's Bench, Common Pleas, or Exchequer Divisions, to the Chancery Division of the High Court, although he is not a Judge of the Division from which the action is transferred.‡

Where the plaintiff prays, not for the execution, but for the creation of a trust, the action is a fit one to be tried by a jury. Where the plaintiff claimed, in the alternative, payments in arrear, or a lump sum, or the investment of such a sum in the name of trustees for her benefit, an application to transfer the action to the Chancery Division was refused.§

See also *Re Hutley, Deards v. Putt*,|| *In Re Boyd's Trusts*,¶ *Cannot v. Morgan*;** and for further cases see the note to Order LI., Rule 2, of the Rules of the Supreme Court, *infra*.

* See Order LIII., Rule 3, of the Rules of the Supreme Court.

† 1 Ch. D., 41. See Order LI., Rule 1, of the Rules of the Supreme Court.

‡ *Hillman v. Mayhew*, 1 Ex. D., 132; 45 L. J. (Ex.), 344; 2 Charley's Cases (Court), 107. § 2 Charley's Cases (Chambers), 10.

|| 1 Ch. D., 11; 45 L. J. (Ch.), 79; 33 L. T., 237; 1 Charley's Cases (Court), 151. ¶ 1 Ch. D., 12; 1 Charley's Cases (Court), 153.

** 1 Ch. D., 1; 45 L. J. (Ch.), 50; 33 L. T., 402; 24 W. R., 90; 1 Charley's Cases (Court), 154.

Act 1875,
s. 12.

SECTION 12.—*Sittings of Court of Appeal.*

Every appeal to the Court of Appeal shall, where the subject-matter of the appeal is a final order, decree, or judgment, be heard before not less than three Judges of the said Court sitting together, and shall, when the subject matter of the appeal is an interlocutory order, decree, or judgment, be heard before not less than two Judges of the said Court sitting together.

Any doubt which may arise as to what decrees, orders, or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal.

Subject to the provisions contained in this section, the Court of Appeal may sit in two Divisions at the same time.

This section is substituted for s. 53 of the Principal Act, which is repealed by s. 33, and the 2nd Schedule hereto. Some of the provisions are similar to those of the repealed enactment, *e.g.*, the quorum of three, and the power to form Divisional Courts. The quorum of three, however, only applies where the appeal is from “a final order, decree, or judgment.” When an appeal is from an interlocutory degree, order, or judgment, the quorum may be reduced to two, and the Court of Appeal is *itself* to decide when the quorum of two will be sufficient.

The Court of Appeal has, since its formation, sat in two Divisions, one at Lincoln’s Inn for the hearing of appeals from the Chancery Division, and one at Westminster for the hearing of appeals from the Common Law Divisions.

The presence of Lord Cairns, C., in the Divisional Court for hearing appeals from the Common Law Divisions, greatly strengthened that Court during the first year of its sittings.

What are, and what are not, final orders, appeals from

which cannot be heard by two Judges of the Court of Appeal, was discussed in the Court of Appeal shortly after the commencement of the Supreme Court of Judicature Acts.* Lord Justice James announced† that the Court of Appeal had determined that all summonses which finally settled the rights of the parties, such as summonses under winding up orders or in administration suits, would be heard by the full Court of Appeal.

Act 1875,
s. 12.

As to what a *single* Judge of Appeal may do, and as to the power of the Court of Appeal, or of a Divisional Court of the Court of Appeal to overrule him, see s. 52 of the Supreme Court of Judicature Act, 1873, *supra*.

By section 16 of the Appellate Jurisdiction Act, 1876, "Orders for constituting and holding Divisional Courts of the Court of Appeal, and for regulating the sittings of the Court of Appeal‡ and of the Divisional Courts of Appeal, may be made, and, when made, in like manner rescinded or altered by the President of the Court of Appeal,§ with the concurrence of the Ordinary Judges of the Court of Appeal, or any three of them; and so much of s. 17 of the " present " Act, as relates to the regulation of any matters subject to be regulated by Orders under " that " section, and so much of any Rules of Court as may be inconsistent with any Order made under " that " section, shall be repealed, without prejudice, nevertheless, to any Rules of Court made in pursuance of the section so repealed, so long as such Rules of Court remain unaffected by Orders made in pursuance of " the 16th " section " of the Appellate Jurisdiction Act.

It may here be mentioned that on the argument of a case in the Court of Appeal *two* Counsel (but *two only*) on either side will be heard by the Court.||

SECTION 13.—*Amendment of s. 60 of 36 and 37 Vict. c. 66, as to District Registrars.*

Whereas by section sixty of the Principal Act it

* *Anon.*, *Times*, Nov. 5th, 1875; Charley's Cases (Court), 84.

† 1 Ch. D., 41; *Times*, Nov. 11th, 1875; 1 Charley's Cases (Court), 87.

‡ See Order LXI., Rule 1 of the Rules of the Supreme Court.

§ The Lord Chancellor (s. 6 of the present Act).

|| See *Sneesby v. The Lancashire and Yorkshire Railway Company*, 1 Q. B. D. 42; 45 L. J. (Q. B.), 1; 33 L. T., 372; 24 W. R., 99.

Act 1875,
c. 18.

is provided that for the purpose of facilitating the prosecution in country districts of legal proceedings, it shall be lawful for Her Majesty by Order in Council from time to time to direct that there shall be District Registrars* in such places as shall be in such Order mentioned for districts to be thereby defined; and whereas it is expedient to amend the said section, Be it therefore enacted that—

Where any such Order has been made, two persons may, if required, be appointed to perform the duties of District Registrar in any district named in the Order, and such persons shall be deemed to be joint District Registrars, and shall perform the said duties in such manner as may from time to time be directed by the said Order, or any Order in Council amending the same.

Moreover, the Registrar of any Inferior Court of Record having jurisdiction in any part of any district defined by such Order (other than a County Court) shall, if appointed by Her Majesty, be qualified to be a District Registrar for the said district, or for any and such part thereof as may be directed by such Order, or any Order amending the same.

Every District Registrar shall be deemed to be an officer of the Supreme Court, and be subject, accordingly, to the jurisdiction of such Court and of the Divisions thereof.

* Query, "Registries."

As to District Registries, see ss. 60, 61, 62, 63, 64, 65, and 66 of the Principal Act and the notes thereto, *supra*, and Orders V., XII. and XXXV. of the Rules of the Supreme Court and the notes thereto, *infra*. Act 1875,
s. 13.

The persons specially indicated by section 60 of the Principal Act, as eligible for the office of District Registrar, are "any Registrar of any County Court or any Registrar or Prothonotary or District Prothonotary of any local Court whose jurisdiction is " thereby " transferred to the High Court of Justice, or from which an appeal is thereby given to the Court of Appeal; or any person, who, having been a District Registrar of the Court of Probate, or of the Admiralty Court, shall under" that " Act become and be a District Registrar of the High Court of Justice, or who shall be appointed such District Registrar." For a list of " the local Courts whose jurisdiction is transferred by the Principal Act to the High Court of Justice," see section 16 of the Principal Act, *supra*. For a list of the " local Courts from which an appeal is given to the Court of Appeal," see section 18 of the Principal Act, *supra*.

On the 12th of August, 1875, the day before the present Act received the Royal Assent, Her Majesty in Council, in exercise of the powers conferred upon Her by s. 60 of the Principal Act, was pleased to order—" that there shall be District Registrars (*sic*) in the places of Liverpool, Manchester, and Preston; and the District Registrar at Liverpool of the High Court of Admiralty. and the District Prothonotary at Liverpool of the Court of Common Pleas at Lancaster,* shall be and are hereby appointed the District Registrars in Liverpool; and the District Prothonotary at Manchester of the said Court of Common Pleas shall be and is hereby appointed the District Registrar in Manchester; and the District Prothonotary at Preston of the said Court of Common Pleas shall be and is hereby appointed the District Registrar at Preston; and that the district for each such place shall be the district now assigned to each such District Prothonotary, under the provisions and authority of the Common Pleas at Lancaster Amendment Act, 1869."

* This was done under the present section, which was passed for the purpose of securing the efficient services of Mr. Paget and Mr. Lowndes jointly, at Liverpool.

Act 1875,
s. 13.

“That there shall be a District Registrar in Durham, and that the District Prothonotary of the Court of Common Pleas at Durham shall be and is hereby appointed the District Registrar in Durham; and that the District shall be the district, for the time being, of the County Court holden at Durham.

“That in the places mentioned in the Schedule annexed, there shall be District Registrars, and that the Registrar of the County Court held in any such place shall be and is hereby appointed the District Registrar in such place, and that the district for each such place shall be the district, for the time being, of the County Court holden at such place.”

The Schedule contains the names of the following places:—Bangor, Barnsley, Barnstaple, Bedford, Birkenhead, Birmingham, Boston, Bradford, Bridgwater, Brighton, Bristol, Bury St. Edmunds, Cambridge, Cardiff, Carlisle, Carmarthen, Cheltenham, Chester, Colchester, Derby, Dewsbury, Dover, Dorchester, Dudley, East Stonehouse, Exeter, Gloucester, Great Grimsby, Great Yarmouth, Halifax, Hanley, Hartlepool, Hereford, Huddersfield, Ipswich, Kingston-on-Hull, King's Lynn, Leeds, Leicester, Lincoln, Lowestoft, Maidstone, Newcastle-upon-Tyne, Newport (Monmouthshire), Newport (Isle of Wight), Newtown, Northampton, Norwich, Nottingham, Oxford, Pembroke Docks, Peterborough, Poole, Portsmouth, Ramsgate, Rochester, Sheffield, Shrewsbury, Southampton, Stockton-on-Tees, Sunderland, Swansea, Truro, Totnes, Wakefield, Walsall, Whitehaven, Wolverhampton, Worcester, York. Under the present section the District Registrar at Liverpool of the High Court of Admiralty, and the District Prothonotary at Liverpool of the Court of Common Pleas at Lancaster, are “joint District Registrars for Liverpool.”

Every effort, it will be seen, has been made to confer, as far as practicable, upon the suitors of the Counties Palatine of Lancaster and Durham, advantages similar to those which they derived from the abolished jurisdiction of their local Courts of Pleas.

The Lord Chancellor, while retaining the office of District Registrar of the Supreme Court at Manchester, which was filled by the late Mr. Worthington, District Prothonotary of the late Court of Common Pleas at Lan-

caster, has abolished the office of District Prothonotary which Mr. Worthington held.

Act 1875,
s. 13.

The office of District Registrar of the Supreme Court is, practically, confined to the persons mentioned as eligible to *first* appointments in section 60 of the Principal Act, and the present section ; and *all* appointments to the office must be made (strange as it may appear) by Orders of Her Majesty in Council.

SECTION 14.—*Amendment of 36 and 37 Vict. c. 66, s. 87, as to enactments relating to Attorneys.*

Whereas under section eighty-seven of the Principal Act, Solicitors and Attorneys will, after the commencement of that Act, be called “ Solicitors of the Supreme Court ” : Be it therefore enacted that—

The Registrar of Attorneys and Solicitors in England shall be called “ The Registrar of Solicitors,” and the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron, or any two of them, may, from time to time, by regulation adapt any enactments relating to Attorneys, and any declaration, certificate, or form required under those enactments to the Solicitors of the Supreme Court under section eighty-seven of the Principal Act.

See the note to s. 87 of the Principal Act, *supra*.

This section supplies an extraordinary omission in the Supreme Court of Judicature Bill, 1874.* No power was taken in that Bill to adapt the existing law relative to the

† At the request of Mr. Williamson, the Secretary of the Incorporated Law Society, the writer placed an amendment to clause 15 of the Supreme Court of Judicature Bill, 1874, on the notice paper of the House of Commons, giving the Secretary power to adapt the registration forms, then in use by the Society, to the provisions of the Principal Act.

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s. 14.

registration of Attorneys and Solicitors to the changes introduced by section 87 of the Principal Act. It was the opinion of those best qualified to judge, that, on and after the 1st of November, 1874, no person could have been entered on the register of the Incorporated Law Society as an Attorney-at-Law.

By regulations made in pursuance of the present enactment the three Common Law Chiefs and the Master of the Rolls "adapted" the following enactments relating to Attorneys "to the Solicitors of the Supreme Court under s. 87 of the Principal Act":—The 6 & 7 Vict. c. 75, ss. 15, 16, 17, 18 and 20; and the 23 and 24 Vict. c. 127 ss. 8, 9, 11 and 23.*

These enactments relate to the Preliminary Examination (23 & 24 Vict. c. 127, s. 8), the Intermediate Examination (23 & 24 Vict. c. 127, s. 9), and the Final Examination and Admission to Practice (6 & 7 Vict. c. 73, ss. 15, 16, 17 and 18; and 23 & 24 Vict. c. 127, s. 11); also to the custody of the Rolls of Solicitors (6 & 7 Vict. c. 73, s. 20); and to the renewal of their annual certificates (23 & 24 Vict. c. 127, s. 23). A general regulation is appended, declaring that as regards every other enactment relating to Attorneys, and every declaration, certificate, or form required by or with reference to such enactment, the same respectively shall be read as if the words, "Solicitor of the Supreme Court," were inserted in such enactment, declaration, certificate or form, in lieu of the word "Attorney."

"General Rules and Regulations as to the Preliminary, Intermediate and Final Examinations and Admission of persons intending to become Solicitors of the Supreme Court, the taking out and renewal of their certificates, and as to re-admission of Solicitors and custody of documents," were issued on the 2nd of November, 1875 (the day after the commencement of the Act of 1873 and this Act), "in pursuance of the powers contained in the adapted enactments."

The "Preliminary Examination" must, under these "General Rules and Regulations," be passed by every

* See the *Recitals* to the "General Rules and Regulations as to Solicitors," of Nov. 2nd, 1875, where the adaptations are set out.

person intending to become a Solicitor (with the exception of persons who have passed certain specified Examinations at Oxford, Cambridge, Dublin, Durham, London, the Queen's University in Ireland, or the College of Preceptors), *before* being bound under Articles of Clerkship. The Examination is in "general knowledge;" and it includes reading, writing, arithmetic, geography, and elementary Latin; and also any two of the following languages:—Latin, Greek, French, German, Spanish or Italian, at the option of the candidate.

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The Examinations are held four times a year—in February, May, July, and October—at the Hall of the Incorporated Law Society, and also, contemporaneously, for the convenience of provincial candidates, at the following towns, or at "some of them:" Birmingham, Brighton, Bristol, Cambridge, Cardiff, Carlisle, Carmarthen, Chester, Durham, Exeter, Lancaster, Leeds, Lincoln, Liverpool, Maidstone, Manchester, Newcastle-upon-Tyne, Oxford, Plymouth, Salisbury, Shrewsbury, Swansea, Worcester, and York. The Examinations at the Hall of the Incorporated Law Society are conducted by "special Examiners," appointed by the three Chiefs of the Common Law Divisions and the Master of the Rolls; the examinations at each of the provincial centres are conducted by two local Solicitors, appointed by the Special Examiners. The Examiners at the Preliminary (and also at the Intermediate) Examination may give minus or negative marks for "incorrect or careless answers." A list of the books, out of which the Examination in the six languages will be conducted, can be obtained from the Registrar of Solicitors five calendar months before the day fixed for the examination.

The candidate must give a calendar month's notice in writing to the Registrar of Solicitors of his desire to be examined; and must name the two languages which he selects, the place at which he wishes to be examined, his age, and the place and mode of his education.

A fee of £2 must be paid by the person examined, on receiving his certificate of having passed a "satisfactory Examination" in "general knowledge."

Every articulated clerk must, under the "General Rules

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s. 14.

and Regulations," undergo an "Intermediate" Examination "within the six calendar months next succeeding the day on which he shall have completed half his term of service." The Examination is in "elementary works on the Laws of England," and in "Mercantile Book-keeping." The Examinations are held in the "Hall or building" of the Incorporated Law Society, four times a year—in January, April, June, and November. The names of the books selected for examination in each year can be obtained from the Registrar of Solicitors in the month of July in the preceding year. The candidate must give the Registrar of Solicitors one calendar month's notice in writing of his intention to present himself for examination, and must leave with the Registrar of Solicitors "21 clear days before the examination day" his "Articles of Clerkship," and the answers to certain formal "questions as to due service" under them. The Examination is conducted by the Masters of the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court *ex-officio*, and by twenty Solicitors of the Supreme Court, nominated by the Master of the Rolls, and any eight of the Judges of the Queen's Bench, Common Pleas, and Exchequer Divisions (such eight Judges to include the three Chiefs of those Divisions). Any six of the Examiners (including one *ex-officio* Examiner) form a quorum for conducting the examination. The twenty Solicitors hold office for one year only, but are all eligible for re-election. A fee of 15s. is payable by each candidate on depositing his Articles of Clerkship, and a further fee of 15s. on receiving his Certificate of having passed his "Intermediate" Examination.

The Final Examination is held at the "Hall or building" of the Incorporated Law Society four times a year—in January, April, June, and November. The Examiners are the same as those who conduct the Intermediate Examinations. The candidate must leave a notice in writing, "signed by himself or his agent," with the Secretary of the Incorporated Law Society of his intention to apply for examination, "six weeks at the least before the first day of the month in which he shall

propose to be examined." The notice must also "state his place or places of residence and service for the last preceding twelve months." The notice, if not acted upon, can be renewed "within one week after the end of the month" for which it was given. The candidate must further leave with the Secretary of the Incorporated Law Society, "twenty-one days before the day on which he is desirous of being examined," his Articles of Clerkship, together with answers to certain formal questions as to his service under them, and as to his non-professional employment (if any) during the period of service. There are two sets of questions, one to be answered by the candidate and one by the Solicitor or London Agent with whom he has served. If he has been a pupil of a Special Pleader or Barrister he must also leave the answers to a third set of questions as to his conduct while *in statu pupillari*. The candidate is to be examined "by written or printed papers touching his fitness and capacity to act as, and in the usual business transacted by, a Solicitor of the Supreme Court." The certificate of the Examiners continues in force for six months only after its date, unless the period is "specially extended by the order of the Master of the Rolls," to whom, also, an appeal lies against a refusal of the certificate. The appeal is in the form of "a petition in writing," which must be presented "within one month next after such refusal," at the Petty Bag Office. No fee is payable on presentation. Subject to this appeal, no person is to be admitted a Solicitor of the Supreme Court without producing a certificate of fitness from the Examiners.

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s. 14.

As regards "the admission of persons intending to become Solicitors of the Supreme Court," the applicant must, "six weeks at least before the first day of the month in which he shall propose to be admitted," "cause to be delivered at the Petty Bag Office a notice in writing, signed by himself, containing a statement of his then place of abode, and the name or names and the place or places of abode, of the person or persons with whom he has served as an articulated clerk during the period of service, and also of his place or places of abode or service

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during the last preceding twelve months." (An alphabetical list of the notices of applicants is posted up at the Petty Bag Office, and a copy of it is supplied to the Secretary of the Incorporated Law Society.) The notice if not acted upon, may be renewed "within one week after the end of the month" for which it was given.

The custody of the Roll of Solicitors of the Supreme Court is confided to the Clerk of the Petty Bag, whose office is in Rolls Yard, Chancery Lane.*

The Roll of Solicitors of the Court of Chancery is complete from the second year of King George II., when it was first required to be kept. The first volume into which the names of Solicitors were copied in alphabetical order ranges from the year 1730 to the year 1791. Except in point of age it would be difficult to distinguish it from the corresponding volume for 1876. The arrangement of the entries—the very binding—is the same. The Roll is now, however, a Roll for the Solicitors not merely of the Chancery Division, but of the Supreme Court. There always have been, and still are, three entries:—1. The date of admission; 2. The name and place of abode; 3. The date of enrolment.†

The alphabetical list, however, is not "the Roll." The Roll is, literally, what its name implies. It is a series of narrow strips of parchment, each about two and a half feet long, stitched together. When the series of strips so stitched together becomes about thirty or forty feet long, it is rolled up and put away. In one sense, each series is a Roll in itself: but in another, the Roll is continuous, for at the end of each series is an intimation that the Roll is continued on a new series.

At the top of each series is written, "Roll of Solicitors of the Supreme Court of the year of the reign of our Sovereign Lady Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith." By the side of this appears the impression of the Seal of the Petty Bag Office, with the

* See as to the subject-matter of the above notes, the General Rules and Regulations as to Solicitors, issued on the 2nd of November, 1875, *infra*.

† Thus: "1875. November 25th. Allingham, Theodore Frederic, of Hawthorn Lodge, Cricklewood. 25th November, 1875."

date at which the Roll was made up, initialed by Mr. Holden, the Senior Clerk. Underneath the title and seal is written, across the whole breadth of the Roll, the following oath :—
“I, A. B., do swear that I will truly and honestly demean myself in the practice of a Solicitor, according to the best of my knowledge and ability. So help me God.” Then follows, in a column, the date at which the roll commenced, and underneath the autograph signatures of a batch of two or three Solicitors enrolled on that day; then the day following, and underneath the autographs of another batch, till the bottom of the strip of parchment is reached. The same process is renewed in a parallel column on the same strip, headed “continued from below.” When the strip is finished, the first column of the next strip is commenced with the heading “continued from above.”

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s. 14.

The only Court which has now a Roll of Solicitors of its own, distinct from that kept at the Petty Bag Office, is the London Court of Bankruptcy.*

As to striking Solicitors off the Rolls, see the note to the 87th section of the Principal Act, and the cases there cited. “All orders for striking any Solicitor off the Rolls, or for suspending any Solicitor from practice, or for re-admitting any Solicitor, or for restoring the name of any Solicitor to the Roll, or for altering the name of any Solicitor on the Roll,” must be filed with the Clerk of the Petty Bag, who thereupon makes the requisite entry on or alteration in the Roll, and informs the Registrar of Solicitors of it.

Six weeks’ notice of any application to be re-admitted, or to take out or to renew the annual certificate of a Solicitor, must be given as in the case of an original admission. The affidavits in support of the application must be filed at the Petty Bag Office, and a copy of them left with the Clerk of the Petty Bag, for delivery by him to the Registrar of Solicitors. The Master of the Rolls has power to dispense with the required notice of intention to take out or renew the annual certificate, if cause be not shewn to his Lordship’s satisfaction, on a summons calling upon the Registrar of Solicitors to shew cause

* See section 9 of the present Act, *supra*. The writer is indebted to the courtesy of Mr. Archibald Murray, Clerk of the “Petty Bag,” for the opportunity of inspecting the Solicitors’ Rolls.

Act 1875,
s. 14.

within ten days against the allowance of the dispensation. Applications for re-admission are heard by the Master of the Rolls, on petition presented at the Petty Bag Office. A copy of the petition must be served on the Registrar of Solicitors not less than fourteen days previous to the hearing. The Master of the Rolls may, if he thinks fit, refer the petition to "any other Division" (*sic*) of the High Court. It may be added that the power of dispensing with *any* rule "as to any re-admission, taking out, or renewal of certificates," is vested in the Master of the Rolls.*

SECTION 15.—*Appeal from Inferior Court of Record.*

It shall be lawful for Her Majesty from time to time, by Order in Council, to direct that the enactments relating to appeals from County Courts shall apply to any other Inferior Court of Record; and those enactments, subject to any exceptions, conditions, and limitations contained in the Order, shall apply accordingly, as from the date mentioned in the Order.

~~The~~ The enactments relating to appeals from County Courts are specified in the notes to section 45 of the Principal Act, *supra*. Under that section the appeal from County Courts lies in all cases, except in the case of appeals under the Bankruptcy Act, 1869, to Divisional Courts of the High Court of Justice.†

SECTION 16.—*Rules in Schedule in substitution for 36 & 37 Vict. c. 66, s. 69, and Schedule.*

The Rules of Court in the first Schedule to this Act shall come into operation at the com-

* See, further, the General Rules and Regulations as to Solicitors, issued on the 2nd of November, 1875, *infra*, and the Solicitors Act, 1877, *infra*.

† See, also, as to Inferior Courts and their Jurisdiction, part vi. of the Principal Act, *supra*.

mencement of this Act, and, as to all matters to which they extend, shall thenceforth regulate the proceedings in the High Court of Justice and Court of Appeal. But such Rules of Court, and also all such other Rules of Court (if any), as may be made after the passing and before the commencement of this Act under the authority of the next section, may be annulled or altered by the authority by which new Rules of Court may be made after the commencement of this Act.

Act 1875,
s. 16.

This section is substituted for section 69 of the Principal Act, which is repealed by section 33 of this Act, and the second Schedule. Section 69 of the Principal Act* is practically re-enacted by the present section, but with the necessary alterations to adapt its provisions to the first Schedule of this Act.

The Rules of Court in the first Schedule hereto, *infra*, consist partly of the Rules appended to the Principal Act, and partly of the Rules drawn up under that Act in 1874, both having been revised and adapted to the present Act.

The last clause of the section will, of course, apply to the "other Rules of Court" issued by Her Majesty by Order in Council on the 12th of August, 1875: Rules of the Supreme Court (Costs). See the next section as to "the authority by which new Rules of Court" were "made" between the 1st of November, 1875, and the 1st of December, 1876; and s. 17 of the Appellate Jurisdiction Act, 1876, as to the authority by which new Rules of Court have been and may be made since the 1st of December, 1876.

"Shall thenceforth regulate the proceedings." A rule *nisi* for a new trial was obtained in Easter Term, 1875, on the ground of the improper admission of evidence at the trial. On the argument of the rule *nisi*, on the 23rd of December, 1875, the Court discharged the rule. The defendants appealed. The Court of Appeal held that

* See the note to that section.

Act 1875,
s. 16.

the Rules of the Supreme Court,* remedying defects in procedure, applied to the motion for a new trial, although the rule nisi had been obtained before they came into operation.†

The Forms in the Appendices to the Schedule are part of the Rules. *Schröder v. Clough.*‡

SECTION 17.—*Provision as to making, &c., of Rules of Court before or after the commencement of the Act, in substitution for 36 and 37 Vict. c. 66, ss. 68 and 74, and Schedule.*

Her Majesty may, at any time after the passing, and before the commencement, of this Act, by Order in Council, made upon the recommendation of the Lord Chancellor and the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and the Lords Justices of Appeal in Chancery, or any five of them, and the other Judges of the several Courts intended to be united and consolidated by the Principal Act, as amended by this Act, or of a majority of such other Judges, make any further or Additional Rules of Court for carrying the Principal Act and this Act into effect; and, in particular, for all or any of the following matters, so far as they are not provided for by the Rules in the first Schedule to this Act; that is to say,

(1.) For regulating the sittings of the High Court of Justice and the Court of Appeal,

* Order XXXIX., Rule 3.

† *Earp v. Faulkner*, 34 L. T., 284; 24 W. R., 774; 2 Charley's Cases (Court), 153.

‡ 35 L. T., 850; *Times*, Jan. 16, 1877.

and of any Divisional or other Courts thereof respectively, and of the Judges of the said High Court sitting at chambers ; and

Act 1875.
s. 17.

- (2.) For regulating the pleading, practice, and procedure in the High Court of Justice and Court of Appeal ; and
- (3.) Generally, for regulating any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof, or of the Supreme Court, or to the costs of proceedings therein.

From and after the commencement of this Act, the Supreme Court may at any time, *with the concurrence of a majority of the Judges thereof present at any meeting for that purpose held (of which majority the Lord Chancellor shall be one),* alter and annul any Rules of Court for the time being in force, and have and exercise the same power of making Rules of Court as is by this section vested in Her Majesty in Council on the recommendation of the said Judges before the commencement of this Act.

All Rules of Court made in pursuance of this section shall be laid before each House of Parliament within such time, and shall be subject to be annulled in such manner as is in this Act provided.

All Rules of Court made in pursuance of this section, if made before the commencement of this Act, shall from and after the commencement of this Act, and if made after the commencement of this Act, shall, from and after they come into

Act 1875,
s. 17.

operation, regulate all matters to which they extend, until annulled or altered in pursuance of this section.

The reference to certain Judges in section twenty-seven of the Principal Act shall be deemed to refer to the Judges mentioned in this section as the Judges on whose recommendation an Order in Council may be made.

This section is substituted for sections 68 and 74 of the Principal Act, *supra*, which are repealed by section 33 and the second Schedule to this Act. See the notes to those sections.

So much of the present section as relates to matters subject to be regulated by s. 16 of the Appellate Jurisdiction Act, 1876, is expressly repealed by that section.

As the present section originally stood, the words "including all matters connected with writs, forms of actions, parties to actions, evidence, and mode of trial," followed the words, "Court of Appeal," in the second subsection of the first paragraph of the section. Mr. Isaac Butt, Q.C., however, obtained in Committee on the Bill in the House of Commons* the omission of the former words, on the ground that the powers which they conferred on the Judges were so extensive that they would give the Judges power to abolish trial by jury. There is now, in consequence of this omission, some apparent tautology in subsections (2) and (3).

On the 12th of August, 1875, Her Majesty in Council in exercise of the powers conferred upon Her by the first paragraph of this section, was pleased, upon the recommendation of the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron, the Lords Justices of Appeal in Chancery, and a majority of the other Judges, to issue six new Orders regulating

* July 5th, 1875. See *Times* of July 6th.

the printing of proceedings, and the cost of proceedings in the Supreme Court.*

Act 1875.
s. 17.

An important alteration was made, in 1876, in the second paragraph of this section. Tacked on to the end of section 17 of the Appellate Jurisdiction Act, will be found the following words, preceded by a comma :—" And all Rules of Court to be made after the passing of this Act, whether made under the Supreme Court of Judicature Act, 1875, or this Act, shall be made by *any three* or more of the following persons, of whom the Lord Chancellor shall be one, namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other Judges of the Supreme Court of Judicature, to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein." The four Judges selected to form with the Lord Chancellor, the Master of the Rolls, and the three Common Law Chiefs, the new legislative body in substitution for the majority of the Supreme Court, are, Sir William Baliol Brett, Mr. Justice Iush, Mr. Baron Pollock, and Mr. Justice Manisty. This appointment is to continue in force until the 1st of January, 1878.† The Supreme Court thus ceased on the 1st of December, 1876, to be any longer a *legislative* body, its legislative functions being thenceforth delegated to a Select Committee within itself, over which it has no control. It still continues to be a *deliberative* Assembly under s. 75 of the Supreme Court of Judicature Act, 1873.

The section of this Act, referred to in the third paragraph of this section, is the twenty-fifth. Every Rule of Court must be laid before each House of Parliament within the forty days next after it is made, if Parliament is then sitting; if not, within forty days after the commencement of the next ensuing Session. The power which made the Rule of Court can, under the present section, annul it; but there is a special provision in s. 25 for annulling, by

* See this Order in Council, *infra*.

† Order of the Lord Chancellor, of the 7th November, 1876, under s. 17 of the Appellate Jurisdiction Act, 1876.

Act 1875,
s. 17.

Order in Council, a new Rule of Court objected to by either House of Parliament.

The "certain Judges," referred to in s. 27 of the Principal Act, were empowered thereby to make Orders before the commencement of that Act for regulating Vacations.

SECTION 18.—*Provision as to Rules of Probate, Divorce and Admiralty Courts, being Rules of the High Court,—in substitution for 36 and 37 Vict. c. 66, s. 70.*

All Rules and Orders of Court in force at the time of the commencement of this Act in the Court of Probate, the Court for Divorce and Matrimonial Causes, and the Admiralty Court, or in relation to appeals from the Chief Judge in Bankruptcy, or from the Court of Appeal in Chancery in bankruptcy matters, except so far as they are expressly varied by the first Schedule hereto, or by Rules of Court made by Order in Council before the commencement of this Act, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively until they shall respectively be altered or annulled by any Rules of Court made after the commencement of this Act.

The present Judge of the Probate Court and of the Court for Divorce and Matrimonial Causes shall retain, and the President for the time being of the Probate and Divorce Division of the High Court of Justice shall have, with regard to non-contentious or common form business in the Probate Court, the powers now conferred on the Judge

of the Probate Court by the thirtieth section of the twentieth and twenty-first years of Victoria, chapter seventy-seven, and the said Judge shall retain, and the said President shall have, the powers as to the making of Rules and Regulations conferred by the fifty-third section of the twentieth and twenty-first years of Victoria, chapter eighty-five.

Act 1875,
s. 18.

This section is substituted for section 70 of the Principal Act, which is repealed by section 33 and the second Schedule of this Act. The repealed enactment is re-enacted by the present section, with the alterations necessary to adapt it to the first Schedule and the 9th section of this Act, *supra*. The words "London Court of Bankruptcy" are omitted, and the words "or in relation to appeals from the Chief Judge in Bankruptcy or from the Court of Appeal in Chancery in bankruptcy matters" are substituted.

For a list of the authorities which contain the Rules and Orders referred to in this section, see the note to s. 70 of the Principal Act, *supra*.

The Admiralty practice with regard to default in pleading prior to the 1st of November, 1875, is, under this section, still in force in Admiralty actions *in rem*.*

By Rule 10 of Order XIII. of the Rules of the Supreme Court, the 4th and 5th Rules of the Admiralty Court Additional Rules of 1871 were "expressly varied"; but by Rule 8 of the Rules of the Supreme Court, December, 1875, Rule 10 of Order XIII. was annulled. The effect of this, taken in connection with the first paragraph of the present section, is that the 4th and 5th of the Admiralty Court Rules of 1871 revive.†

This Rule preserves appearance under protest in the Admiralty Division.‡

By virtue of the first paragraph of this section the Probate Court Orders of July, 1862, apply to a cause

* *The "Sfactoria,"* 35 L. T., 431; 25 W. R., 62.

† *The "Polymede,"* 1 P. D., 121; 34 L. T., 367; 24 W. R., 256; 2 Charloy's Cases (Court), 156.

‡ *The "Fivar,"* 35 L. T., 782.

Act 1875,
s. 18.

pending in the Probate Court at the commencement of the Supreme Court of Judicature Acts. Therefore, when a cause so pending in the Probate Court has been heard by a Judge of the Probate Division without a jury, the evidence being given *visâ voce*, an application for a re-hearing may, under Rule 60 of the Probate Court Orders of July, 1862, be made by motion within fourteen days from the day on which the cause was heard.*

The Rules of the Supreme Court, Order LXII., declare that "nothing in these rules shall affect the practice or procedure in proceedings for Divorce or other Matrimonial Causes."

As to appeals from the Chief Judge in Bankruptcy, see *In Re Gilbert, Ex Parte Viney*,† and *In Re Leicer, Ex Parte Garrard*.‡

By section 30 of the 20 & 21 Vict. c. 77, it is enacted that "it shall be lawful for the Judge of the Court of Probate, from time to time, with the concurrence of the Lord Chancellor and of the Lord Chief Justice, or any one of the Judges of the Superior Courts of Law by the Chief Justice named in this behalf, to repeal, amend, add to or alter any of the Rules or Orders of the Court of Probate," made before, and taking effect when, that Act should come into operation, "as to him, with such concurrence as aforesaid, may seem fit."

By section 53 of the 20 & 21 Vict. c. 85, the Court for Divorce and Matrimonial Causes "shall make such Rules and Regulations concerning the practice and procedure under" that "Act as it may, from time to time, consider expedient, and shall have full power, from time to time, to revoke and alter the same."

SECTION 19.—*Provisions as to Criminal Procedure subject to future Rules remaining unaltered—in substitution for 36 and 37 Vict. c. 66, s. 71.*

Subject to the first Schedule hereto and any Rules of Court to be made under this Act, the

* *Sugden v. Lord St. Leonard's*, 1 P. D., 154; 45 L. J. (P. D. & A.), 49; 34 L. T., 372; 24 W. R., 860; 2 Charley's Cases (Court), 160.

† 4 Ch. D., 794; W. R., 364.

‡ W. R., *ib.*

practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice and in the Court of Appeal respectively including the practice and procedure with respect to Crown Cases Reserved, shall be the same as the practice and procedure in similar causes and matters before the commencement of this Act.

Act. 1875,
s. 19.

This section is substituted for section 71 of the Principal Act, which is repealed by section 33 and the second Schedule to this Act. Section 71 of the Principal Act is re-enacted by the present section with the alterations necessary to adapt it to the first Schedule of this Act, "subject to the first Schedule hereto and any Rules of Court to be made under this Act" being substituted for "subject to any rules of Court to be made under and by virtue of this Act."

"Crown Cases Reserved." The interpretation clause of the Principal Act (s. 100) applies to this Act, by virtue of s. 1 of this Act, *supra*, "Crown Cases Reserved," therefore, means such questions of law reserved on criminal trials as are mentioned in the Act of the 11th and 12th years of Her Majesty's reign, chapter 78.

This section is intimately connected with the 47th section of the Principal Act. See the note to that section, *supra*, and the recent cases there cited. See, also, Order LXII., *infra*.

SECTION 20.—*Provision as to Act not affecting Rules of Evidence or Juries—in substitution for 36 and 37 Vict. c. 66, s. 72.*

Nothing in this Act or in the first Schedule hereto, or in any Rules of Court to be made under this Act, save as far as relates to the power of the Court for special reasons to allow depositions of affidavits to be read, shall affect the

Act 1875,
ss. 20.

mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to jurymen or juries.

This is one of the transition clauses of this Act.

This section is substituted for section 72 of the Principal Act, which is repealed by the 33rd section and the second Schedule to this Act. The 72nd section of the Principal Act is re-enacted by the present section with the addition of the word "first" before "Schedule."

"Save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read." This has reference to Order XXXVII., Rules 1 and 2 of the first Schedule hereto:—"In the absence of any agreement between the parties, and subject to these Rules, the witnesses at the trial of any action or at any assessment of damages, shall be examined *virâ voce* and in open Court, but the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided that where it appears to the Court or Judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.* Upon any motion, petition, or summons evidence may be given by affidavit; but the Court or a Judge may on the application of either party, order the attendance for cross-examination of the person making any such affidavit."†

Order XXXVIII. regulates the practice where evidence is allowed to be given by affidavit. As to oral evidence, see the C. L. P. Act, 1854, ss. 18-31.

"Trials by jury or the rules of evidence."—See section

* This Rule is a re-enactment of Rule 36 of the Principal Act.

† This Rule is a re-enactment of Rule 37 of the Principal Act.

22 of this Act, *infra*. As to "Juries," see 6 George IV. c. 50 ; 25 and 26 Vict. c. 107, and 33 and 34 Vict. c. 77. Act 1875,
s. 20.
As to "the rules of evidence," see Taylor on Evidence.

SECTION 21.—*Provision for saving of existing Procedure of Courts when not inconsistent with this Act or Rules of Court—in substitution for 36 and 37 Vict. c. 66, s. 73.*

Save as by the Principal Act or this Act, or by any Rules of Court, may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is by the Principal Act or this Act transferred to the said High Court and to the said Court of Appeal respectively, under or by virtue of any law, custom, general order, or rules whatsoever, and which are not inconsistent with the Principal Act or this Act, or with any Rules of Court, may continue to be used and practised in the said High Court of Justice and the said Court of Appeal respectively in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective Courts of which the jurisdiction is so transferred, if the Principal Act and this Act had not passed.

This is one of the transition clauses of this Act.

This section is substituted for section 73 of the Principal Act, which is repealed by section 33 and the second Schedule to this Act. The 73rd section of the Principal Act is re-enacted by the present section, with the alterations necessary to adapt it to the present enactment, as well as to the Principal Act. By the Rules of the Supreme Court,

Act 1975,
s. 21.

Order I., Rule 3, "all other proceedings in and applications to the High Court, may, subject to those Rules, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made, if the Act had not been passed."

In the note prefixed to the Rules in the schedule hereto, it is declared that "where no other provision is made by the Act or these Rules, the present procedure and practice remain in force." See the note to s. 76 of the Principal Act, *supra*.

The next section was originally an amendment to the present section, proposed by Mr. Watkin Williams, Q.C., and accepted by the then Attorney-General, in Committee on the Bill in the House of Commons. By some mysterious process in the House of Lords the amendment was severed from the present section, to which it was attached in the copy of the Bill as amended in Committee, printed for the use of the House of Commons on the motion of the writer, and reappeared, in the Queen's printer's copy, as a separate section, with a marginal note to itself. There can be little doubt that the transformation of the amendment of Mr. Williams into a separate section is a decided improvement.*

SECTION 22.—*Nothing in Principal Act to prejudice right to have issues submitted, &c.*

Whereas by section forty-six of the Principal Act it is enacted, that "any Judge of the said High Court sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court may reserve any case, or any point in a case, for the consideration of a Divisional Court, or may direct any case or point in a case to be argued before a Divisional Court:" Be it hereby enacted, that nothing in the said Act, nor in any Rule or Order

* It involved, however, an alteration in the numbering of all the subsequent clauses, making clause 22 the repealing clause, *e.g.*, section 33.

made under the powers thereof or of this Act, shall take away or prejudice the right of any party to any action to have the issues for trial by Jury submitted and left by the Judge to the Jury before whom the same shall come for trial, with a proper and complete direction to the Jury upon the law, and as to the evidence, applicable to such issues :

Act. 1875,
s. 22.

Provided also, that the said right may be enforced either by motion in the High Court of Justice, or by motion in the Court of Appeal, founded upon an exception entered upon or annexed to the record.

The marginal note to this section is not very intelligible, but it was only added, it is believed, by some clerk in the House of Lords, just before the Bill received the Royal Assent, when Mr. Watkin Williams' amendment to the preceding section was mysteriously transformed into a separate section.*

See s. 46 of the Principal Act, and the note thereto. Sect. 46 of the Principal Act has been lately considerably weakened by the provisions of sect. 17 of the Appellate Jurisdiction Act, 1876, enabling a single Judge to dispose of "all business arising out of any action." That enactment expressly repeals so much of sect. 46 of the Principal Act as is inconsistent with its provisions. The Rules of the Supreme Court, Order XXXVI., Rules 3 and 4, give an absolute right to either party to require a trial by Jury in any action in the *Common Law Divisions*.†

Trial by Jury is generally considered to have had its origin in the famous declaration of King John in *Magna Charta* :‡—"Nullus liber homo capiatur, vel imprisonetur aut

* See the note to the preceding section.

† *Sugg v. Silber*, 1 Q. B. D., 362; 45 L. J. (Q. B.), 682; 34 L. T., 682; 24 W. R., 640. But not an action in the *Chancery Division*; *Clarke v. Cookson*, 2 Ch. D., 746; Order XXXVI., Rule 26 of the Rules of the Supreme Court.

‡ It now appears as 9 Hen. III. c. 29.

Act 1875,
s. 22.

disseiziatur de libero tenemento suo, vel de libertatibus vel liberis consuetudinibus suis, aut utlagetur aut exulet, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terræ."

The "*lex terræ*" referred, Mr. Hallam believes,* to trial by combat and by ordeal, the latter including "trial by handling or walking on red hot iron, by plunging the arm into boiling fluids, by floating or sinking in cold water, or by swallowing a piece of consecrated bread."† Mr. Chute‡ seeks to connect it with the power assumed by the Court of Chancery, in defiance of the Common Law, of imprisoning for contempt of Court.

The common lawyers in the House of Commons viewed with considerable alarm the sweeping powers confided to the Judges by the Supreme Court of Judicature Act, 1873, and the present measure. It was in deference to this feeling that the following subsection of clause 33 was left out:—"There shall be repealed, from and after the date at which any Order in Council, or Rule of Court, or Order of the Lord Chancellor, made in pursuance of or for the purposes of this Act, is made, any provision of any Act, of Parliament inconsistent with such Order in Council, Rule of Court, or Order of the Lord Chancellor." It was in deference to this feeling that the Queen in Council was deprived (if she has been deprived) of the power of regulating all matters connected with "forms of actions," "evidence," and "mode of trial," which was conferred upon her by subsection (2) of sect. 17 of this Act, *supra*, as it came down from the Lords. It was in deference to this feeling that the 4th section of this Act, *supra*, was ultimately settled so as to exclude from the possibility of being invited to sit as "Additional Judges" in the Court of Appeal, the members of the Chancery Division of the High Court. Lastly, it was in deference to the same feeling that the amendment of Mr. Watkin Williams, which forms the present section, was embodied in this Act.§

* Hallam's Middle Ages, vol. II., p. 328 n. (r), 12th edition.

† *Ibid.*, vol. III., p. 294. ‡ "Equity under the Judicature Act," p. 155.

§ As the amendment originally stood, it had in the margin the following references:—13 Ed., I., st., 1, c. 31; 3 and 4 Vict. c. 65, s. 15; 15 and 16 Vict. c. 76, s. 184; 20 and 21 Vict. c. 85, s. 39; 22 and 23 Vict. c. 21; 23 and 24 Vict. c. 144, s. 1. These references have been omitted in the Act as printed by the Queen's printer. They connected the amendment with the abolition of *Bills of exceptions* by Order LVIII., Rule 1.

By Order LVIII., Rule 1, of the Rules of the Supreme Court, it is provided that "Bills of exceptions shall be abolished." The effect of a Bill of exception was to bring up a Judge's ruling on a point of law at the trial direct to the Court of Appeal.

Act 1875,
s. 22.

The right to go direct from the Judge at the trial to the Court of Appeal is, to some extent, preserved by the present section ; and is also enlarged by the 7th Rule of the Rules of the Supreme Court, December, 1876. The latter Rule is as follows :—"Where, at or after the trial of an action by a jury the Judge has directed any judgment to be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment on the ground that the judgment directed to be entered is wrong, by reason of the Judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them. Where, at or after the trial of any action before a Judge, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment, and enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong. Any application under this Rule shall be made to the Court of Appeal."

SECTION 23.—*Regulation of Circuits.*

Her Majesty may at any time after the passing of this Act, and from time to time, by Order in Council, provide in such manner and subject to such regulations as to Her Majesty may seem meet, for all or any of the following matters :

1. For the discontinuance, either temporarily or permanently, wholly or partially, of any existing Circuit, and the formation of any new Circuit by the union of any counties or parts of counties, or partly in one way and partly in the other, or by the consti-

Act 1875,
c. 23.

tution of any county or part of a county to be a Circuit by itself; and, in particular, for the issue of Commissions for the discharge of civil and criminal business in the county of Surrey to the Judges appointed to sit for the trial by jury of causes and issues in Middlesex or London, or any of them; and

2. For the appointment of the place or places at which Assizes are to be holden on any Circuit; and
3. For altering, by such authority and in such manner as may be specified in the Order, the day appointed for holding the Assizes at any place on any Circuit in any case, where, by reason of the pressure of business or other unforeseen cause, it is expedient to alter the same; and
4. For the regulation, so far as may be necessary for carrying into effect any Order under this section, of the venue in all cases, civil and criminal, triable on any Circuit or elsewhere.

Her Majesty may from time to time, by Order in Council, alter, add to, or amend any Order in Council made in pursuance of this section; and in making any Order under this section may give any directions which it appears to Her Majesty to be desirable to give for the purpose of giving full effect to such Order.

Provided that every Order in Council made under this section shall be laid before each House of Parliament within such time, and shall be subject to be annulled in such manner, as is in this Act provided.

Act 1875,
c. 23.

Any Order in Council purporting to be made in pursuance of this section shall have the same effect in all respects as if it were enacted in this Act.

The power hereby given to Her Majesty shall be deemed to be in addition to and not in derogation of any power already vested in Her Majesty in respect of the matters aforesaid; and all enactments in relation to Circuits, or the places at which Assizes are to be holden or otherwise, in relation to the subject-matter of any Order under this section, shall, so far as such enactments are inconsistent with such Order, be repealed thereby, whether such repeal is thereby expressly made or not; but all enactments relating to the power of Her Majesty to alter the Circuits of the Judges, or places at which Assizes are to be holden, or the distribution of Revising Barristers among the Circuits, or otherwise enabling or facilitating the carrying the object of this section into effect, and in force at the time of the passing of the Principal Act, shall continue in force, and shall with the necessary variations, if any, apply, so far as they are applicable, to any alterations in or dealings with Circuits, or places at which Assizes are to be holden, made or to be made after the passing of this Act, or to

Act 1875,
s. 23.

any other provisions of any Order made under this section; and if any such Order is made for the issue of Commissions for the discharge of civil and criminal business in the county of Surrey, as before mentioned in this section, that county shall for the purpose of the application of the said enactments be deemed to be a Circuit, and the senior Judge for the time being so commissioned, or such other Judge as may be for the time being designated for that purpose by Order in Council shall, in the month of July or August in every year, appoint the Revising Barristers for that county and the cities and boroughs therein.

The expression "Assizes" shall in this section be construed to include sessions under any Commission of Oyer and Terminer, or Gaol Delivery, or any Commission in lieu thereof issued under the Principal Act.

This section is substituted for section 68 of the Principal Act, subsection 2, repealed by the 33rd section, and the second Schedule to the present Act.

As to Circuits, see sections 11, 26, 29, 37, 76, and 93 of the Principal Act, and Order XXXVI. of the Rules of the Supreme Court.

The Judicature Commission, in their First Report,* thus referred to the subject of the re-arrangement of Circuits:—
"The necessity for holding Assizes in every county, without regard to the extent of the business to be transacted in each county, leads, in our judgment, to a great waste of judicial strength, and a great loss of time in going from one Circuit town to another. and causes much unnecessary cost and inconvenience to those whose attendance is necessary or customary at the Assizes.

"The distribution of a small amount of business among a

large number of Circuit towns is the cause of serious evil to the suitors. From the impossibility of ascertaining beforehand with accuracy the business likely to arise, the time allotted to some towns often proves insufficient, and complaints arise that the trial of causes is hurried, or that the parties are driven to dispose of their cases by reference, or otherwise, unless they submit to the loss and inconvenience of having their causes postponed until the next Assizes. The expense and trouble of bringing together Judges, sheriffs, and grand jurors, and the time occupied in the preliminaries of an Assize, are the same at a small place, where there is but little business, as at a large one. The number of jurors, special and common, required to be in attendance, is much increased by the limited extent of the existing Assize districts. If those districts were enlarged, a juror, who had once attended at the Assizes, would probably be relieved from future attendance for a considerable time.

Act 1875,
s. 23.

“We are, therefore, of opinion that the judicial business of the country should no longer be arranged and distributed according to the accidental division of counties, but that the venue for trials should be enlarged, and that several counties should be consolidated into districts of a convenient size,—that such districts should for all purposes of trial at the Assizes, both in civil and criminal cases, be treated as one venue or county,—and that all counties of towns or cities should for the purposes of such districts be included in an adjacent district or county.

“In arranging the Circuits, we think that they should be so remodelled as to render the amount of business likely to be transacted on each Circuit as nearly equal as may be practicable; and in fixing the towns in which the Assizes should be held, we recommend that those towns should be chosen which are the most central,—with which there is the best and most rapid railway communication from all parts of the district,—and to which the inhabitants are most in the habit of resorting for the purpose of business. We may add, that, after deducting the counties now forming the Home Circuit, we have reason to think that six Circuits for England and Wales would be found sufficient.”

The following is a copy of the recommendations of the

Act 1875, s. 23. Judges as to Circuits, printed by order of the House of Commons :—

“1. The Circuits of the Judges shall be as follows :

“I. The North-Western Circuit, which shall include the counties of Westmoreland, Cumberland, and Lancaster.

“II. The North-Eastern Circuit, which shall include the counties of Northumberland, Durham, and York.

“III. The Midland Circuit, which shall include the counties of Lincoln, Derby, Nottingham, Warwick, Leicester, Northampton, Rutland, Buckingham, and Bedford.

“IV. The Norfolk Circuit, which shall include the counties of Norfolk, Suffolk, Huntingdon, Cambridge, Hertford, Essex, Kent, and Sussex.

“V. The Oxford Circuit, which shall include the several counties and cities heretofore included in the Oxford Circuit.

“VI. The Western Circuit, which shall include the several counties and cities heretofore included in the Western Circuit.

“VII. The North and South Wales Circuit, which and each of the Divisions whereof (that is to say, the North Wales and the South Wales Divisions), shall include the several counties heretofore included therein respectively. But two Judges shall hold the Assizes for the county of Glamorgan instead of one.

“2. No Assizes shall be held in or for the county of Surrey.

“3. The Judges of Assize for any county or city may, by order, adjourn the opening of such Assizes at any time, and for such period as they may deem to be necessary or expedient.*

It will be seen that the Judges recommend that there should be seven Circuits—not six, as proposed by the Judicature Commission.

Much opposition was offered to the proposal to abolish the Home Circuit, and to the recommendation of the Judges, that “no Assizes shall be held in or for the county of Surrey.”

Memorials from Birmingham, Plymouth, Leeds and

* Return to an Order of the House of Commons, dated the 31st of July, 1874.

Kendal, and also from an influential committee of members of the Northern Circuit, with regard to the rearrangement of Circuits, will be found in the second Appendix to the Fifth (and Final) Report of the Judicature Commission. Act 1876,
s. 23.

An Order of Her Majesty in Council was issued on the 5th of February, 1876, which provided that the then existing Circuits should be "discontinued," and that there should be *seven* Circuits, the "Northern," including the counties of Westmoreland, Cumberland and Lancaster; the "North Eastern," including the counties of Northumberland, Durham and York, the county of the city of York, and the county of the town of Newcastle-upon-Tyne; the "Midland," including the counties of Lincoln, Nottingham, Derby, Warwick, Leicester, Northampton, Rutland, Buckingham and Bedford, the county of the city of Lincoln, and the county of the town of Nottingham, together with the borough of Leicester; the "South Eastern," including the counties of Norfolk, Suffolk, Huntingdon, Cambridge, Hertford, Essex, Kent and Sussex, and the county of the city of Norfolk*; the "Oxford," including the counties of Berks, Oxford, Worcester, Stafford, Salop, Hereford, Monmouth, Gloucester, the county of the city of Worcester, and the city of Gloucester; the "Western," including the counties of Southampton,† Wilts, Dorset, Devon, Cornwall, Somerset, the county of the city of Exeter and the county of the city of Bristol; the "North and South Wales," including, in the North Wales Division, the counties of Montgomery, Merioneth, Caernarvon, Anglesea, Denbigh, Flint, and Chester; in the South Wales Division, the counties of Glamorgan, Carmarthen, Pembroke, Cardigan, Brecknock, Radnor, the county of the borough of Carmarthen, and the county of the town of Haverfordwest.

It will be seen that these arrangements of the Circuits follow very closely the recommendations of the Judges. The Order in Council contained a special proviso that "nothing in this Order shall affect the provisions of an Order in Council made on the 4th day of May, 1864, relating to the division of the county of Lancaster into three Divisions, or the provisions of an Order in Council made

* Query, Norwich?

† Hampshire.

Act 1875,
s. 28.

on the 10th day of June, 1864, as amended by an order in Council made on the 9th day of July, 1864, relating to the division of the county of York into two Divisions; and that "the county of Surrey shall not be included in any Circuit; but Commissions shall be issued not less often than twice in every year for the discharge of civil and criminal business therein."

The Order in Council further declares that "the places where Assizes may be held shall be the places at which Assizes have hitherto been held."

The Winter Assizes Act, 1876, gave the Queen power by Order in Council, to provide for uniting any county in which it may be inexpedient to hold separate Winter Assizes with any neighbouring county or counties, and for the appointment of a place or places at which such Winter Assizes shall be held for such united counties. Orders in Council were issued under this Act on the 23rd of October, 1876,* which see, *infra*.

"All enactments shall continue in force." This refers to the 3 and 4 Wm. IV., c. 71, to the 26 and 27 Vict. c. 121—giving power to Her Majesty in Council to alter any of the Circuits—and to the 36 and 37 Vict. c. 70, giving power to alter the number of Revising Barristers on any Circuit. The last-mentioned measure, which was carried by the writer,† was rendered necessary by the abolition of the office of Assistant Revising Barrister, by the 35 and 36 Vict. c. 84, s. 1, which might have led to a dead lock in the Revision Courts, as the stereotyped number of Revising Barristers fixed by s. 28 of the 6 and 7 Vict. c. 18 could not, without fresh legislation, be increased; and that number, without Assistant Revisers, was inadequate.

The powers conferred by the 36 and 37 Vict. c. 70, were exercised by Mr. Justice Brett at the Liverpool Assizes. He appointed three new Revising Barristers under that Act, for the Northern Circuit.

"The distribution of Revising Barristers." By an Order in Council of June 27, 1876, it was ordered, under the present section, that the number of Revising Barristers to be

* W. N., 1876, p. 455.

† The present Lord Chancellor (then in Opposition) kindly took charge of it in the House of Lords.

appointed for the county of Middlesex, the City of London, and the boroughs of the county of Middlesex, should be three ; for the counties, cities, boroughs, and places within the Northern Circuit, eight ; for the counties, cities, boroughs and places within the North-Eastern Circuit, ten ; for those within the Midland Circuit, thirteen ; within the South-Eastern Circuit, fifteen ; within the Oxford Circuit, twelve ; within the Western Circuit, fourteen ; within the North Wales Division of the North and South Wales Circuit, six ; within the South Wales Division of the North and South Wales Circuit, six ; and within the county of Surrey, two.*

Act 1875,
s. 28.

SECTION 24.—*Additional power as to regulation of Practice and Procedure by Rules of Court.*

Where any provision in respect of the practice or procedure of any Courts the jurisdiction of which is transferred by the Principal Act or this Act to the High Court of Justice or the Court of Appeal, are contained in any Act of Parliament, Rules of Court may be made for modifying such provisions to any extent that may be deemed necessary for adapting the same to the High Court of Justice and the Court of Appeal, without prejudice nevertheless to any power of the Lord Chancellor, with the concurrence of the Treasury, to make any Rules with respect to the Paymaster-General, or otherwise.

Any provisions relating to the payment, transfer, or deposit into, or in, or out of any Court of any money or property, or to the dealing therewith, shall, for the purposes of this section, be

* See the Order in Council, which is set out *in extenso* in the W. N., 1876, p. 315.

Act 1875,
s. 24.

deemed to be provisions relating to practice and procedure.

The Lord Chancellor, with the concurrence of the Treasury, may from time to time, by Order, determine to what accounts and how intituled any such money or property as last aforesaid, whether paid, transferred, or deposited before or after the commencement of this Act, is to be carried, and modify all or any forms relating to such accounts; and the Governor and Company of the Bank of England, and all other companies, bodies corporate, and persons shall make such entries and alterations in their books as may be directed by the Lord Chancellor, with the concurrence of the Treasury, for the purpose of carrying into effect any such Order.

This is one of the transition clauses of this Act.

By section 18 of the Court of Chancery (Funds) Act, 1872 (35 and 36 Vict. c. 44), "the Lord Chancellor, with the concurrence of the Treasury," may from time to time "make rules" for regulating the "deposit" "payment," and "transfer" "in, into, and out of" the Court of Chancery of money and securities which belong to suitors of that Court, or are otherwise capable of being deposited in or paid or transferred into that Court or in or into the Bank of England, with the privity of the Paymaster-General; and, generally, for carrying into effect the transfer of the office of Accountant-General to the Paymaster General.

Singularly enough, it is not stated in the first paragraph of the present section by whom the new "Rules of Court," for adapting Acts of Parliament subsequently to the 1st of November, 1875, are to be made.

It is presumed that section 17 of the Appellate Juris-

tion Act, 1876, supplies this omission after the 1st of December, 1876. "All Rules of Court" under the present Act are thenceforth to be made by the authority mentioned in that section.

Act 1875,
s. 24.

The second paragraph of the present section, taken in connection with section 17 of the Appellate Jurisdiction Act, 1876, appears to transfer to the authority mentioned in that section the power vested in the Lord Chancellor, with the advice and assistance of the Lords Justices, Master of the Rolls, and Vice Chancellors, by section 19 of the Court of Chancery (Funds) Act, 1872, of making Orders of Court for regulating the "practice and procedure" as to Chancery Funds.

On the 22nd of December, 1874, and, therefore, prior to the commencement of this Act, the Lord Chancellor, "with the concurrence of the Treasury," made Rules under section 18 of the Court of Chancery (Funds) Act, 1872, which came into operation on the 11th of January, 1875.*

The Lord Chancellor, at the same time, "with the advice and assistance" of the Lords Justices, Master of the Rolls, and Vice Chancellors, made Orders of Court,† under section 19 of the Court of Chancery (Funds) Act, 1872, "for regulating the practice and procedure" of the Court of Chancery for the purpose of carrying that Act, generally, "into effect."

SECTION 25.—*Orders and Rules to be laid before Parliament, and may be annulled on Address from either House.*

Every Order in Council and Rule of Court required by this Act to be laid before each House of Parliament shall be so laid within forty days next after it is made, if Parliament is then sitting, or if not, within forty days after the commencement of the then next ensuing Session; and if an Address is presented to Her Majesty by either

* They are set out in extenso in the *Weekly Notes*, 1875, pp. 11-20.

† *Ibid.*, pp. 20, 21.

Act 1875,
s. 25.

House of Parliament, within the next subsequent forty days on which the said House shall have sat, praying that any such Rule or Order may be annulled, her Majesty may thereupon by Order in Council annul the same; and the Rule or Order so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same.

This section shall come into operation immediately on the passing of this Act.

This section is substituted for the last paragraph of section 68 of the Principal Act, which is repealed by section 33 and Schedule 2 of this Act. The last paragraph of the 68th section of the Principal Act is re-enacted *verbatim* by the present section, except that Orders in Council are included as well as Rules of Court.

This is one of the sections expressly excepted from the operation of the first clause of section 2 of this Act, *supra*.

By section 17 of this Act, *supra*, it is provided that "all Rules of Court made in pursuance of" that "section shall be laid before Parliament within such time, and be subject to be annulled in such manner as is" by the present section "provided."

Section 17 of the Appellate Jurisdiction Act, 1876, contains a similar proviso as to Rules of Court made under that Act.

Section 23 of this Act contains a similar proviso as to "every Order in Council" for the regulation of Circuits "made under" that "section."

N.B.—The Rules and Orders are valid till annulled.

SECTION 26.—*Fixing and collection of Fees in High Court and Court of Appeal.*

The Lord Chancellor, with the advice and consent of the Judges of the Supreme Court or any

three of them, and with the concurrence of the Treasury, may, either before or after the commencement of this Act, by Order, fix the fees and per-centages (including the per-centage on estates of lunatics) to be taken in the High Court of Justice or in the Court of Appeal, or in any Court created by any Commission or in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, or by any officer paid wholly or partly out of public moneys who is attached to any of those Courts or the Supreme Court, or any Judge of those Courts, including the Masters and other Officers in Lunacy, and may from time to time, by Order, increase, reduce, or abolish all or any of such fees and per-centages, and appoint new fees and per-centages to be taken in the said Courts or offices or any of them, or by any such officer as aforesaid.

Act 1875,
s. 26.

Any Order made in pursuance of this section shall be binding on all the Courts, offices, and officers to which it refers, in the same manner as if it had been enacted by Parliament.

All such fees and per-centages shall (save as otherwise directed by the Order) be paid into the receipt of Her Majesty's Exchequer and be carried to the Consolidated Fund, and with respect thereto the following Rules shall be observed :

- (1.) The fees and per-centages shall, except so far as the Order may otherwise direct, be

Act 1875,
s. 26.

taken by stamps, and if not taken by stamps shall be taken, applied, accounted for, and paid over in such manner as may be directed by the Order.

- (2.) Such stamps shall be impressed or adhesive, as the Treasury from time to time direct.
- (3.) The Treasury, with the concurrence of the Lord Chancellor, may from time to time make such Rules as may seem fit for publishing the amount of the fees and regulating the use of such stamps, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for insuring the proper cancellation of stamps and for keeping accounts of such stamps.
- (4.) Any document which ought to bear a stamp in pursuance of this Act, or any Rule or Order made thereunder, shall not be received, filed, used, or admitted in evidence unless and until it is properly stamped, within the time prescribed by the Rules under this section regulating the use of stamps, but if any such document is through mistake or inadvertence received, filed, or used without being properly stamped, the Lord Chancellor or the Court may, if he or it shall think fit, order that the same be stamped as in such Order may be directed.

.) The Commissioners of Inland Revenue shall keep such separate accounts of all money received in respect of stamps under this Act, as the Treasury may from time to time direct; and subject to the deduction of any expenses incurred by those Commissioners in the execution of this section, the money so received shall, under the direction of the Treasury, be carried to and form part of the Consolidated Fund.

Act, 1874,
s. 28.

.) Any person who forges or counterfeits any such stamp, or uses any such stamp, knowing the same to be forged or counterfeit, or to have been previously cancelled or used, shall be guilty of forgery, and be liable on conviction to penal servitude for a term not exceeding seven years, or to imprisonment with or without hard labour for a term not exceeding two years,

an Order under this section may abolish any existing fees and per-centages which may be taken in the said Courts or offices, or any of them, by the said officers or any of them, but subject to the provisions of any Order made in pursuance of this section, the existing fees and per-centages shall continue to be taken, applied, and accounted in the existing manner.

The provisions of subsections (2), (3), (4), and (5) of this section are copied from the Common Law Courts (Fees) Act, 1865,* ss. 2, 3, 4, and 6, respectively, with this differ-

* 28 and 29 Vict. c. 45.

Act 1875,
s. 26.

ence, that the Rules mentioned in subsection (3) are to be made with the concurrence of the Lord Chancellor, instead of with the concurrence of the three Chiefs of the Common Law, and that in subsection (4) the Lord Chancellor is substituted for a Judge of one of the Superior Courts of Common Law. See also the 32 and 33 Vict. c. 91, ss. 19, 20, 21, 22, and 23.

“The per-centage on estates of lunatics.”* All fees on proceedings in lunacy throughout the several offices of the Courts are now, under the Lunacy Regulation Act, 1853, except those mentioned in s. 29 of that Act, abolished, and in lieu thereof, a per-centage on the clear annual income of each lunatic’s estate is to be paid (s. 26) at the rate of £4 per cent. for each clear annual income amounting to £100, and under £1,000; at the rate of £3 per cent. for each clear annual income amounting to £1,000 and under £5,000; and at the rate of £2 per cent. for each clear annual income amounting to £5,000 and upwards, subject to the restrictions therein mentioned as to the total amount payable in each class. All incomes under £100 are exempt from paying any per-centage. By s. 30 the Lord Chancellor may, with the advice and assistance of the Lords Justices, from time to time, reduce and raise (but not to higher rates than those above-mentioned) the rate of per-centage.† The per-centage and fees are collected by means of stamps (s. 31).

On the 26th October, 1875, and therefore prior to the commencement of the Supreme Court of Judicature Acts, the Commissioners of Inland Revenue gave notice, that stamps applicable to the scale of fees ‡ under these Acts might be obtained at Somerset House, Room No. 3; and also that stamps, theretofore appropriated to the Courts of Chancery and Common Law respectively, might continue to be used in the Chancery and Common Law Divisions of the Supreme Court, so far as they were applicable to the new scale of fees.§

On the 28th of October, 1875, “the Lord Chancellor,

* See Elmer on Lunacy Practice, c. 19.

† See also the 15 and 16 Vict. c. 87, s. 14.

‡ As to the new scale of fees, see the Rules of the Supreme Court (Costs), *infra*.

§ W. N., 1875, p. 44.

with the advice and consent of the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron, the Lords Justices of Appeal in Chancery, Mr. Baron Bramwell, and Mr. Justice Lindley, and with the concurrence of two of the Lords of the Treasury, fixed the fees and per-centages to be taken under the present section. The Orders directed that in District Registries the Court fees should be taken in money, but otherwise in stamps, and fixed two scales of fees and per-centages, one called "the Lower," and the other the "Higher Scale." The Schedule annexed to the Orders contains, arranged in parallel columns, the fees and per-centages applicable to summonses, writs, commissions, and warrants; to appearances; to copies; to attendances; to oaths; to filing documents; to certificates; to searches and inspections; to the examination of witnesses; to the hearing; to judgments, decrees, and orders; to taking accounts; to taxation of costs; to petitions; to the register of *lis pendens* and judgments; and to several miscellaneous matters. The Orders provided that the leading test as to the applicability of each of the scales was to be the circumstance that it was applicable in the case of the fees of Solicitors under the Rules of the Supreme Court (Costs).* In the Chancery Division, however, the Solicitor is permitted to file a certificate that the "Lower Scale" of fees is applicable, and then officers can only charge upon that scale, subject to any deficiency in Court fees being made good, if the Solicitor should become entitled, and be allowed, himself to charge according to the "Higher Scale."†

On the same day as the last-mentioned Orders, "the Treasury, with the concurrence of the Lord Chancellor," made Orders under subsection (3) of this section, "as to the taking of the fees and per-centages in the Supreme Court by Stamps, except in the District Registries." This Order was of a temporary character; and was, to a great extent, superseded by another Order, issued on the 22nd day of April, 1876, by "the Treasury with the concurrence of the Lord Chancellor," under subsection (3) of this section.

Act 1875,
s. 26.

* Order II. of the Orders as to Court Fees.

† These Orders came into operation on the 1st of November, 1875.

Act 1875,
s. 26.

An order was issued, on the 1st of February, 1876, under this section by the Lord Chancellor, with the advice and consent of Mr. Baron Bramwell, Mr. Justice Brett, and Mr. Justice Hannen, and with the concurrence of two of the Lords of the Treasury, fixing the fees to be taken by the Official Referees. As to this Order, see the notes to section 83 of the Principal Act, *supra*.*

SECTION 27.—*Provisions as to Lancaster Fee Fund, and salaries, &c., of officers of Courts at Lancaster and Durham. 32 & 33 Vict. c. 37.*

Whereas by the Common Pleas at Lancaster Amendment Act, 1869,† the fees taken by the Prothonotaries and District Prothonotaries in pursuance of that Act are directed‡ to be carried to the credit of “the Prothonotaries’ Fee Fund Account of the County Palatine of Lancaster,” and certain salaries and expenses connected with the offices of the said Prothonotaries and District Prothonotaries are directed to be paid out of that account :§

And whereas, on the twenty-fourth day of June one thousand eight hundred and seventy-four, there was standing to the credit of that account a sum of ten thousand seven hundred and fifty-five pounds consolidated three pounds per centum Bank Annuities and one thousand eight hundred and ten pounds cash, or thereabouts :

And whereas the fees received in the Court of Pleas of Durham are applied in payment of dis-

* The two Orders of the 28th October, 1875, and the Orders of the 1st of February, and 22nd of April, 1876, made under this section are all set out *in extenso*, *infra*.

† 32 & 33 Vict. c. 37.

‡ s. 17.

§ s. 18.

bursements connected with the office of the Prothonotary of that Court, and any surplus of such fees is paid into the Receipts of Her Majesty's Exchequer, and any deficiency of the amount of the said fees to pay such disbursements is charged on the Consolidated Fund of the United Kingdom :

Act 1875,
c. 27.

And whereas after the commencement of the Principal Act, the jurisdiction of the Court of Common Pleas at Lancaster and the Court of Pleas at Durham is by that Act transferred to and vested in the High Court of Justice, and it is expedient to make further provision respecting the expenses of those Courts and the said stock and cash standing to the credit of the Prothonotaries' Fee Fund Account of the County Palatine of Lancaster :

Be it therefore enacted that—

After the commencement of the Principal Act there shall be paid out of the moneys provided by Parliament such sums by way of salary or remuneration to the Prothonotaries and District Prothonotaries of the Court of Common Pleas at Lancaster and the Court of Common Pleas at Durham and their clerks, and such sums for rent, taxes, and other outgoings at their offices, as the Lord Chancellor, with the concurrence of the Treasury, may from time to time direct.

As soon as each Prothonotary and District Prothonotary of the Court of Common Pleas at Lancaster has accounted for and paid all fees and

Act 1875,
s. 27.

moneys which he shall have received by virtue of his said office, the Chancellor of the Duchy of Lancaster shall cause any security given by such officer in pursuance of section seventeen of the Common Pleas at Lancaster Amendment Act, 1869,' to be cancelled, and delivered up, or otherwise discharged.

As soon as may be after the commencement of the Principal Act, the Treasury and the Chancellor of the Duchy and County Palatine of Lancaster shall ascertain the amount of stock and cash standing to the credit of the Prothonotaries' Fee Fund Account of the County Palatine of Lancaster, after paying thereout to the Receiver General of the revenues of the Duchy of Lancaster the amount of the fees remaining in the Prothonotary's hands on the twenty-fourth day of October, one thousand eight hundred and sixty-nine, and paid to that account in pursuance of section seventeen of the last-mentioned Act, and all other sums justly due to Her Majesty in right of Her said Duchy and County Palatine; and the Treasury shall by warrant direct the Governor and Company of the Bank of England to transfer to the Commissioners for the Reduction of the National Debt the amount of stock and cash so ascertained and either to cancel the stock in their books or otherwise dispose of the same as may be directed by the warrant; and the Governor and Company of the Bank of England shall transfer the stock and cash, and cancel or otherwise dispose of the

stock according to the warrant, without any order from the Lord Chancellor or the Chancellor of the said Duchy and County Palatine or any other person.

Act 1875,
s. 27.

The Commissioners for the Reduction of the National Debt shall apply all cash transferred to them in pursuance of this section in the purchase of Bank Annuities which shall be cancelled or otherwise disposed of in like manner as the said stock.

See sections 17 and 18 of the statute 32 & 33 Vict. c. 37. Section 16 of the Principal Act transfers to and vests in the High Court of Justice the jurisdiction of the Court of Common Pleas at Lancaster and the Court of Pleas at Durham.

By the second Order in Council of the 12th of August, 1875, the District Prothonotaries at Liverpool, Manchester, and Preston were appointed District Registrars for the respective places for which they were District Prothonotaries, and it was provided that "the District for each place shall be the District now assigned to each such District Prothonotary, under 'the Common Pleas at Lancaster Amendment Act, 1869.'"

The District Prothonotary of the Court of Pleas at Durham was, at the same time, appointed District Registrar in Durham.

The Lord Chancellor, under the powers conferred upon him by s. 77 of the Principal Act, abolished the office of District Prothonotary at Manchester, on the death of its occupant, Mr. Worthington, in 1876.

SECTION 28.—*Annual Account of Fees and Expenditure.*

The Treasury shall cause to be prepared annually an account for the year ending the thirty-first day of March, showing the receipts and expenditure during the preceding year in respect

Act 1875,
s. 28.

of the High Court of Justice and the Court of Appeal, and of any Court, office, or officer, the fees taken in which or by whom can be fixed in pursuance of this Act.

Such account shall be made out in such form and contain such particulars as the Treasury, with the concurrence of the Lord Chancellor, may from time to time direct.

Every officer by whom or in whose office fees are taken which can be fixed in pursuance of this Act, shall make such returns and give such information as the Treasury may from time to time require for the purpose of enabling them to make out the said account.

The said account shall be laid before both Houses of Parliament within one month after the thirty-first day of March in each year, if Parliament is then sitting, or, if not, then within one month after the next meeting of Parliament.

The provisions of this section are copied from the following enactments:—29 & 30 Vict. c. 101, s. 7; 30 & 31 Vict. c. 122, ss. 1-8; and 32 & 33 Vict. c. 91, s. 24.

SECTION 29.—*Amendment of law as to payments to senior Puisne Judge of Queen's Bench and Queen's Coroner.*

Whereas fines and other moneys paid into the Court of Queen's Bench for Her Majesty's use are received by the Queen's Coroner and Attorney, and out of such moneys there is paid in pursuance

of a writ of Privy Seal an annual sum of forty pounds, at the rate of ten pounds for every term, to the second Judge of the Court of Queen's Bench, and by section seven of the Act of the sixth year of King George the Fourth, chapter eighty-four, it is enacted that the said termly allowance of ten pounds shall continue to be paid to the said second Judge in addition to his salary :

Act 1875,
s. 29.

And whereas out of the said moneys there is also payable in pursuance of the said writ of Privy Seal an annual sum of ten pounds to the Queen's Coroner and Attorney :

And whereas it is expedient to determine such payments :

Be it therefore enacted as follows :

After the passing of this Act the said sums of forty pounds and ten pounds a year shall cease to be payable by the Queen's Coroner and Attorney out of the above-mentioned moneys.

So long as the person who, on the first day of March, one thousand eight hundred and seventy-five, was the second Judge of the Court of Queen's Bench continues to be such second Judge, there shall be payable to him out of the Consolidated Fund of the United Kingdom the annual sum of forty pounds in addition to his salary, and that annual sum shall be payable to him by instalments of ten pounds at the like times at which the said termly allowance of ten pounds has

Act 1875,
s. 29.

heretofore been payable to him, or at such other times as the Treasury, with the consent of the Judge, may direct.

So long as the person who, on the first day of March, one thousand eight hundred and seventy-five, was the Queen's Coroner and Attorney continues to hold that office, there shall be payable to him out of moneys provided by Parliament the annual sum of ten pounds, and such sum shall be payable to him at the like time at which the said annual sum of ten pounds has heretofore been payable to him, or at such other time as the Treasury, with the consent of such Queen's Coroner or Attorney, may direct.

See the 6 George IV. c. 84, s. 7, which is repealed by section 33, and the second Schedule to this Act.

This section took effect on August 11th, 1875 (s. 2 of this Act, *supra*).

SECTION 30.—*Amendment of 35 and 36 Vict. c. 44 as to the transfer of Government securities to and from the Paymaster-General on behalf of the Court of Chancery and the National Debt Commissioners.*

Whereas by section sixteen of "The Court of Chancery Funds Act, 1872,"* it is enacted that an Order of the Court of Chancery may direct securities standing to the account of the Paymaster-General on behalf of the Court of Chancery to be converted into cash, and that where such

* 35 and 36 Vict. c. 44. The 16th section should have been included in Schedule 2 of this Act. By an oversight it has been omitted.

order refers to Government securities such securities shall be transferred to the Commissioners for the Reduction of the National Debt in manner herein mentioned :

And whereas the said section contains no provision for the converse cases of the conversion of cash into securities and the transfer of securities from the said Commissioners to the account of the Paymaster-General on behalf of the Court of Chancery :

And whereas such conversion and transfer, and the other matters provided by the said section can be more conveniently provided for by Rules made in pursuance of section eighteen of the said Act ; and it is expedient to remove doubts with respect to the power to provide by such Rules for the investment in securities of money in Court, and the conversion into money of securities in Court :

Be it therefore enacted as follows :

Section sixteen of "The Court of Chancery Funds Act, 1872," is hereby repealed.

Rules may from time to time be made in pursuance of section eighteen of "The Court of Chancery Funds Act, 1872," with respect to the investment in securities of money in Court, and the conversion into money of securities in Court, and with respect to the transfer to the Commissioners for the Reduction of the National Debt of Government securities ordered by the Court to

Act 1875,
s. 36.

be sold or converted into cash; and to the transfer by those Commissioners to the Paymaster-General for the time being on behalf of the Court of Chancery of Government securities ordered by the Court of Chancery to be purchased.

This section shall come into operation on the passing of this Act, and shall be construed together with "The Court of Chancery Funds Act, 1872," and shall be subject to any alteration in that Act made by or in pursuance of the Principal Act or this Act.

This section comes within the exception of section 2 of this Act, *supra*, and therefore came in force on the 11th of August, 1875. The section (which is not very germane to the subject-matter of the Act) was inserted in Committee, in the House of Commons.

The Court of Chancery Funds Act, 1872, 35 & 36 Vict. c. 44, has already been referred to under section 24 of this Act, *supra*. The 18th section of that Act provides that the Rules to be made under the powers conferred by the section shall be made by "the Lord Chancellor, with the concurrence of the Treasury."

SECTION 31.—*Abolition of Secretary to the Visitors of Lunatics, 16 and 17 Vict. c. 70.*

Whereas under "The Lunacy Regulation Act, 1853,"* it is provided that there shall be a secretary to the Visitors of Lunatics therein mentioned, and it is expedient to abolish that office: Be it therefore enacted as follows :—

After the passing of this Act there shall cease to be a secretary to the Visitors of Lunatics.

* 16 & 17 Vict. c. 70.

The Treasury shall award, out of moneys provided by Parliament, to the person who holds at the passing of this Act the office of secretary to the Visitors of Lunatics such compensation by way of annuity or otherwise, as having regard to the conditions on which he was appointed to his office, the nature, salary, and emoluments of his office, and the duration of his services, they may think just and reasonable, so that the same be granted in accordance with the provisions and subject to the conditions contained in "The Superannuation Act, 1859."*

Act 1875,
s. 2.

This section is within the exception of s. 2 of this Act, *supra*, and took effect on the 11th of August, 1875.

By s. 22 of the Lunacy Regulation Act, 1853 (16 and 17 Vict. c. 70), "there shall be a secretary to the Visitors, who shall hold office during pleasure, and the Lord Chancellor shall from time to time, as a vacancy shall occur in the office of secretary, appoint, by writing under his hand, a fit person to fill the vacancy."

That enactment is, by the present section, by implication, repealed.

SECTION 32.—*Amendment of 32 and 33 Vict. c. 83, s. 19, and 32 and 33 Vict. c. 71, s. 116, as to payment of unclaimed dividends to persons entitled.*

Whereas by section nineteen of "The Bankruptcy Repeal and Insolvent Court Act, 1869" † it is enacted as follows: "All dividends declared in any Court acting under the Acts relating to Bankruptcy or the Relief of Insolvent Debtors which

* 22 Vic. c. 26.

† 32 & 33 Vic. c. 83.

Act 1875,
s. 32.

“ remain unclaimed for five years after the com-
 “ mencement of this Act, if declared before that
 “ commencement, and for five years after the
 “ declaration of the dividends if declared after the
 “ commencement of this Act, and all undivided
 “ surpluses of estates administered under the
 “ jurisdiction of such Court which remain un-
 “ divided for five years after the declaration of a
 “ final dividend in the case of bankruptcy, or for
 “ five years after the close of an insolvency under
 “ this Act, shall be deemed vested in the
 “ Crown, and shall be disposed of as the Com-
 “ missioners of Her Majesty’s Treasury direct;
 “ provided that any time after such vesting
 “ the Lord Chancellor may, if he think fit,
 “ by reason of the disability or absence beyond
 “ seas of the person entitled to the sum so vested,
 “ or for any other reason appearing to him
 “ sufficient, direct that the sum so vested shall be
 “ repaid out of moneys provided by Parliament,
 “ and shall be distributed as it would have been
 “ if there had been no such vesting: ”

And whereas a similar enactment with respect to unclaimed dividends in bankruptcy was made by section one hundred and sixteen of “ The Bankruptcy Act, 1869 : ”*

And whereas it is expedient to give to persons entitled to any such unclaimed dividends or other sums greater facilities for obtaining the same :
 . Be it therefore enacted as follow :—

* 32 & 33 Vict. c. 71.

Any Court having jurisdiction in the matter of any bankruptcy or insolvency, upon being satisfied that any person claiming is entitled to any dividend or other payment out of the moneys vested in the Crown in pursuance of section nineteen of "The Bankruptcy Repeal and Insolvent Court Act, 1869," or of section one hundred and sixteen of "The Bankruptcy Act, 1869," may order payment of the same in like manner as it might have done if the same had not by reason of the expiration of five years become vested in the Crown in pursuance of the said sections.

Act 1875,
s. 32.

This section shall take effect as from the passing of this Act.

This section, which is not very germane to the subject-matter of the Act (especially as by sect. 9 the London Court of Bankruptcy is to remain distinct from the Supreme Court) was inserted in Committee in the House of Commons.* It is framed in the interest of persons whose title to "unclaimed dividends" would have otherwise lapsed to the Crown by effluxion of time. By s. 33 of the present Act and the second Schedule, the provisos to s. 116 of the Bankruptcy Act, 1869,† and to s. 19 of the Bankruptcy Repeal and Insolvent Act, 1869,‡ respectively, are repealed, the wider enactment contained in this section being substituted for them.

SECTION 33.—*Repeal.*

From and after the commencement of this Act there shall be repealed—

* The "new clauses" 30 and 32 make the Act somewhat in the nature of, what is termed, an "omnibus Act."

† "Provided that, at any time after such vesting, the Lord Chancellor or any Court authorised by him may, by reason of the disability or absence beyond the seas of the persons entitled to the sum so vested, or for any other reason appearing to him sufficient, direct that the said sum shall be repaid out of money provided by Parliament."

‡ For this proviso, see paragraph 1 of the present section.

Act 1875,
s. 33.

- (1.) The Acts specified in the second Schedule to this Act, to the extent in the third column of that Schedule mentioned, without prejudice to anything done or suffered before the said commencement under the enactments hereby repealed; also
- (2.) Any other enactment inconsistent with this Act or the Principal Act.

In addition to the enactments specified in the Schedule there are repealed by this Act—

By s. 3, s. 5 of the Principal Act, from “provided” to “21.”*

By s. 4, s. 54 of the Principal Act.

By s. 10, subsection (1) of section 25 of the Principal Act.

By s. 30, s. 16 of “The Court of Chancery Funds Act, 1872” (35 and 36 Vict. c. 44), and

By s. 31 (impliedly), s. 22 of the Lunacy Regulation Act, 1853 (16 and 17 Vict. c. 70).

“(2.) Any other enactment inconsistent with this Act or the principal Act.” The extent of this reversal of previous enactments will not be known fully for many years to come. It was hoped that Vol. XI. of the Revised Edition of the Statutes would throw some light on the extent to which the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), is repealed by this subsection; but, with some insignificant exceptions,† the Editor has reproduced the whole of that Act, just as if the Supreme Court of Judicature Acts had never been passed.

As this section was sent down from the Lords, it contained another subsection:—

“(3.) From and after the date at which any Order in Council or Rule of Court, or Order of the Lord Chancellor, made in pursuance of or for the purposes of this Act, is made, any provision of any Act of Parliament inconsistent with such Order in Council, Rule of Court, or Order of the

* See, however, the note to s. 3 of this Act, *supra*.

† Sections 10, 24, 26, 92, 100, 231, 233, and 234.

Chancellor." See the note to s. 22 of the present Act, *supra*.

Act. 1876.
s. 32.

SECTION 34.—*As to Vacancies in any Office within s. 77 of Principal Act.*

Whereas, by the seventy-seventh section of the Principal Act, it is provided that, upon the occurrence of a vacancy in the office of any officer coming within the provisions of the said section, the Lord Chancellor, with the concurrence of the Treasury, may, in the event of such office being considered unnecessary, abolish the same, or may reduce the salary, or alter the designation or duties thereof, notwithstanding that the patronage thereof may be vested in an existing Judge; but that nothing in the said Act contained shall interfere with the office of Marshal attending any Commissioner of Assize: And whereas it is expedient to add to the said section: Be it enacted, that, upon the occurrence of any vacancy coming within the provisions of the said section, an appointment shall not be made thereto for the period of one month without the assent of the Lord Chancellor, given with the concurrence of the Treasury; and, further, the Lord Chancellor may, with the concurrence of the Treasury, suspend the making any appointment to such office for any period not later than the first day of January, one thousand eight hundred and seventy-seven, and may, if it be necessary, make provision in such manner as he thinks fit for the tem-

Act 1875,
s. 34.

porary discharge, in the meantime, of the duties of such office.

See Section 77 of the Principal Act, *supra*, and the note thereto.

By s. 6 of the Supreme Court of Judicature Act, 1877, the present section "shall be construed as if the 1st day of January, 1879, were therein inserted in lieu of the 1st day of January, 1877."

SECTION 35.—*Amendment of Principal Act, s. 79, as to Chamber Clerks.*

Be it enacted, that any person who, at the time of the commencement of this Act, shall hold the office of Chamber Clerk, shall be eligible at any time thereafter for appointment to the like office, anything in the Principal Act to the contrary notwithstanding; and that, if any such person shall be so appointed after the commencement of this Act, he shall, if the salary assigned to such office by or under the Principal Act be less than the salary received by him at the time of the commencement of this Act, be entitled to receive a salary not less than that so formerly received by him, so long as he shall retain such office, but shall not be entitled to receive or claim any pension in respect of his service, unless the Treasury, in its absolute discretion, shall think fit to sanction the same.

This section was not in the Bill, as sent down from the House of Lords.

The existing Chamber Clerks of the Judges occupied, prior to this Act, a nominally insecure, but really secure position, holding their appointments under the 15

and 16 Vict. c. 73 s. 8, by which it is enacted that "it shall be lawful for the Lord Chief Justices and the Lord Chief Baron each to appoint three clerks: and for the other Justices and Barons each to appoint two clerks, and such officers shall hold their offices during the pleasure of the Judges by whom they are appointed, and if continued by their successors, during the pleasure of such successors." The two clerks were a "Body" Clerk and a "Chamber" Clerk. The succeeding Judges almost invariably reappointed the Chamber Clerks of their predecessors, the knowledge and skill which a Chamber Clerk of standing could bring to bear on many knotty points of practice, being invaluable to the incoming Judge.

Act 1875,
s. 35.

Sect. 79 of the Principal Act severed the connection established by the Legislature between the Chamber Clerks and the Judges, empowering the Judge to appoint two Clerks, a Senior and a Junior, at salaries much lower than those enjoyed by the Body Clerk and Chamber Clerk respectively.

The existing Chamber Clerks were not referred to at all in the 79th section, but it was declared that "the duties of Chamber Clerks, so far as relates to business transacted in chambers by Judges appointed after the passing of this Act, shall be performed by officers of the Court in the permanent Civil Service of the Crown."

This proviso evidently shut out the then existing Chamber Clerks from all hope of being reappointed on the death or retirement of the Judges who respectively appointed them. In 1873 the writer had taken some part in bringing the claims of the Chamber Clerks under the notice of the then Attorney-General, Sir John (now Lord) Coleridge, and when the present measure was brought forward, the writer was requested to take up their case. Accordingly he placed the following new clause on the notice paper of the House of Commons:—

"Whereas, by the Act of the fifteenth and sixteenth years of Her present Majesty, chapter seventy-three, it is enacted, 'That the Chamber Clerks to the Judges shall 'hold their offices during the pleasure of the Judges by whom 'they are appointed; or, if continued by the successors 'of such Judges, during the pleasure of such successors:'

"And whereas the Chamber Clerks to the Judges ap-

Act 1875,
c. 35.

pointed in pursuance of the said enactment have usually been continued by the successors of the Judges by whom they have been appointed :

“ And whereas, by the seventy-ninth section of the Principal Act, it is enacted : ‘ That the duties of Chamber Clerks, so far as relates to business transacted in chambers by Judges appointed after the commencement of that Act, shall be performed by Officers of the Court in the permanent Civil Service of the Crown,’ and no provision is made in the Principal Act for continuing the existing Chamber Clerks to the Judges in their respective offices after the death or retirement of the Judges by whom they were respectively appointed :

“ Be it enacted, That, upon the death or retirement of any of the existing Judges, the Chamber Clerk appointed by him shall be eligible to be continued in the office of Chamber Clerk, anything in the Principal Act to the contrary notwithstanding.”

The then Attorney-General (Sir R. Baggallay) and the Financial Secretary of the Treasury (Mr. W. H. Smith) carefully considered the question, and adopted the enacting part of the above new clause with a slight variation in phraseology, adding words which preserve the salaries of the existing Chamber Clerks from being reduced :—

“ Be it enacted, That any person who, at the time of the commencement of this Act, shall hold the office of Chamber Clerk shall be eligible at any time thereafter for appointment to the like office, anything in the Principal Act to the contrary notwithstanding ; and that, if any such person shall be so appointed after the commencement of this Act, he shall, if the salary assigned to such office by or under the Principal Act be less than the salary received by him at the time of the commencement of this Act, be entitled to receive a salary not less than that formerly received by him so long as he shall retain such office, but shall not be entitled to receive or claim any pension in respect of his service.”

The words, “ Be it enacted that,” formed, in the writer’s new clause, a connecting link between the recital and the enacting part ; but they are surplusage in their present position.

It seemed somewhat hard that the Chamber Clerks,

some of whom had served for thirty and one for fifty years, should be entirely debarred from ever applying for a pension. Accordingly, the writer gave notice of the following amendment to the Attorney-General's new clause :—

Act 1875,
s. 35.

“ As an amendment to Mr. Attorney-General's proposed new clause as to Chamber Clerks, at end add, ‘ unless the Treasury, in its absolute discretion, shall think fit to sanction the same.’ ”

This amendment of the writer's was adopted by the Government. It now, as will be perceived, forms part of the present section.*

* N.B.—At the time of going to press a Treasury Committee is sitting upon the “ administrative offices ” connected with the Supreme Court. It is to be hoped that this Committee will deal in a liberal spirit with the claims of the existing Chamber Clerks. The clause of the 79th section of the Principal Act requiring that “ the duties of Chamber Clerks, so far as relates to business transacted in Chambers by Judges appointed after the 1st of November, 1875, shall be performed by officers of the Court in the permanent Civil Service of the Crown,” *has been totally disregarded*. No appointment has yet been made under the clause. The Chamber Clerks of Judges appointed before the 1st of November, 1875, have been performing, in many instances *double* duties : thus the Chamber Clerk of Mr. Justice Lindley has had the duty cast upon him of drawing up orders for Mr. Justice Lopes in Mr. Justice Lindley's name ; and the Chamber Clerks of Mr. Baron Cleasby and Mr. Baron Pollock have had the duty cast upon them of drawing up orders for Mr. Justice Hawkins ! This is, of course, in violation of the 79th section of the Principal Act ; but the cheerful performance of these double duties gives the Chamber Clerks who have done the double duties a strong claim for appointment under that section as *permanent* Civil Servants of the Crown. The most recent arrangement entered into, is one by which Sir George Bramwell, Sir William Baliol Brett, and Sir Richard Amphlett, the three new Judges of the Court of Appeal, lend their Chamber Clerks to Mr. Justice Manisty, Mr. Justice Lopes, and Mr. Justice Hawkins, the three new Judges of the Common Law Divisions of the High Court of Justice, to perform the duties of Chamber Clerks for the latter, while the former are not on Circuit ; but the loan is temporarily withdrawn while the former are on Circuit.

The present section has been allowed to remain a dead letter. Mr. Justice Archibald and Mr. Justice Quain have recently died, and Mr. Justice Blackburn has been appointed a Lord of Appeal in Ordinary ; but their Chamber Clerks, though eligible under the present section for reappointment, have been thrown out of employment, and it is feared that the remaining Chamber Clerks of Judges appointed before the commencement of the Acts will share the same fate on the death or retirement of their Judges.

[NOTE.—*Wherever the words "the present Proceedings" occur in these Rules the present Proceedings shall be deemed to mean the present Practice remain in force.*]

**Rules
of Court.**

This is the Schedule referred to in section 16 of this Act, *supra*.
"The Rules of Court in the first Schedule to this Act, shall have full operation at the commencement of this Act, and as to all matters in which they extend shall thenceforth regulate the proceedings in the Court of Justice and Court of Appeal. But such Rules of Court as all such other Rules of Court (if any) as may be made after the commencement and before the commencement of this Act under the authority of section 16 may be annulled or altered by the authority by which new Rules of Court may be made after the commencement of this Act."

The authority by which new Rules were made between the 1st of November, 1875, and the 1st of December, 1876, was defined in section 17) "the Supreme Court, with the concurrence of a majority of the Judges thereof present at any meeting for that purpose (of which majority the Lord Chancellor shall be one)." This was in accordance with the recommendation of the Judicature Commission that "power should be vested in the Supreme Court to regulate from time to time, the procedure and practice in all its Divisions." The 17th section of the Appellate Jurisdiction Act, 1876, which came into operation on the 1st of December, 1876, the power of making Rules of Court was vested in "any three or more of the following persons, of whom the Lord Chancellor shall be one:—namely, the Lord Chancellor, the Lord Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and two Judges of the Supreme Court"—(Brett, L. J., Lush, J., Pollock, C. B., and Manisty, J.).

The Rules in this Schedule are derived from two sources:—

1. The Schedule (now repealed) to the Principal Act, as to which see section 69 of that Act and the note thereto.
2. The Rules framed in 1874 under the 68th section of the Principal Act, but which were not issued by authority.

It will be found that the Rules in this Schedule emanate from both of these sources. The various provisions have, of course, been re-cast by the Legislature, in order to adapt them to the present state of the law.

The note at the head of this Schedule relative to existing

(which is copied from the Rules of Court drawn up in 1874 under the Principal Act) carries out the principle embodied in the 21st section of this Act:—"Save as by the Principal Act, or this Act, or by any Rules of Court, may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is by the Principal Act or this Act transferred to the said High Court and to the said Court of Appeal respectively, under or by virtue of any law, custom, general order, or rules whatsoever, and which are not inconsistent with the Principal Act or this Act, or with any Rules of Court, may continue to be used and practised in the said High Court of Justice and the said Court of Appeal respectively, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective Courts of which the jurisdiction is so transferred, if the Principal Act and this Act had not passed." One peculiarity of these Rules is that they re-enact many sections of the Common Law Procedure Acts almost *verbatim*; and omit all allusion to the source from which they are derived. They also enact many of the Rules framed by the Judges without any allusion to those Rules. The question arises, what becomes of the sections of the Common Law Procedure Acts and of the *Regule Generales*, which are not expressly enacted or re-enacted in this Schedule? Are they repealed or rescinded by implication? It is apprehended that so far as they are inconsistent with the present Rules, the former Rules and enactments touching procedure and pleading must be taken to be, *pro tanto*, repealed; but otherwise, by virtue of section 21, to be still of full force and effect.

Act 1875.
Schedule.

Since the above was written, the Common Law Procedure Act, 1852, has been reprinted in the Revised Edition of the Statutes without any alteration except the omission of a few unimportant sections. It will, therefore, still be necessary for the legal practitioner and the Supreme Court to laboriously ascertain in any given case the precise extent to which that Act is repealed by the Principal Act, by this Act, and by the Rules of the Supreme Court. (See the note to s. 33 of this Act, *supra*.)

As to the matters *expressly* excepted from these Rules, see Order LXII., *infra*.

By the Rules of the Supreme Court, December, 1875, it is provided (Rule 1) that "the Rules in the " present " Schedule may be cited as 'THE RULES OF THE SUPREME COURT.'"

In the present Schedule the Rules of the Supreme Court issued subsequently to the 1st of November, 1875, have been inserted in their proper places under the respective Orders to which they are ancillary.

ORDER I.

FORM AND COMMENCEMENT OF ACTION.

Rule 1.

All actions which have hitherto been commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster,

Order I.,
Rule 1.

or in the Court of Pleas at Durham, and all suits which have hitherto been commenced by bill or information in the High Court of Chancery, or by a cause *in rem* or *in personam* in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an "action."

This Rule is a re-enactment of the first part of Rule I. of the Principal Act.

The Common Law denomination, "action," has been adopted, in preference to the Equity term "suit;" but many of the proceedings bear more resemblance to a "suit" than an "action."

The jurisdiction of the Court of Common Pleas at Lancaster and of the Court of Pleas at Durham is transferred to the High Court by section 16 of the Principal Act.

In Divorce and other Matrimonial Causes the proceedings are still commenced by filing a petition.*

"Action" does "not include a criminal proceeding by the Crown" (s. 100 of the Principal Act).

Rule 2.

With respect to interpleader, the procedure and practice now used by Courts of Common Law under the Interpleader Acts, 1 & 2 Wm. IV. c. 58, and 23 & 24 Vict. c. 126, shall apply to all actions and all the Divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons, and before delivering a defence.

The general principles recognised in the application of interpleader are (1) that the person applying that others may be required to interplead be already defendant in an action at the suit of one of them; (2) that the claims of both claimants be in respect of the very same matter;† (3) that the party applying claim no interest in the subject-matter;‡ (4), that the applicant be not colluding with either party;§ (5), that the applicant be in possession of the matter in dispute, and thus able to obey such order as may be made with regard to it,|| and (6), that the same question be raisable upon the interpleader issue, as was in dispute between the original parties.¶ A sheriff may successfully apply for an interpleader order, as between

* Rules and Regulations relating to Divorce and other Matrimonial Causes, 26th December, 1865, Rule 1.

† *Slaney v. Sidney*, 14 M. & W., 800.

‡ *Braddick v. Smith*, 9 Bing., 84. § *Belcher v. Smith*, 9 Bing., 82.

|| *Ireland v. Bushell*, 5 Dowl., 147.

¶ *Baker v. The Bank of Australasia*, 1 C.B. (N.S.), 515.

execution creditors and persons claiming goods seized by the Sheriff in execution, although no action has been commenced against him; provided that a *bonâ fide* legal claim has been actually made to goods lawfully seized by him.*

Order I.,
Rule 2.

The Interpleader Acts will, under this Rule, apply for the first time to the Chancery Division.

The leading Act on Interpleader is the 1 & 2 Wm. IV. c. 58, referred to in the Rules, and which is as follows:—

“Whereas it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in Equity against the plaintiff and such third party, usually called a Bill of Interpleader, which is attended with expense and delay; for remedy thereof, Be it enacted by the King's Most Excellent Majesty, by and with the consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That upon application made by or on behalf of *any defendant* sued in any of His Majesty's Courts of Law at Westminster, or in the Court of Common Pleas of the County Palatine of Lancaster, or the Court of Pleas of the County Palatine of Durham, in any action of assumpsit, debt, detinue, or trover† such application being made after declaration,‡ and before plea, by affidavit or otherwise,§ showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court or to pay or dispose of the subject-matter of the action in such manner as the Court (or any Judge thereof) may order or direct, it shall be lawful for the Court, or any Judge thereof, to make rules and orders calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well as of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or with the consent of the plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims and determine the same in a summary manner, and to make such other rules and orders therein as to costs and all other matters as may appear to be just and reasonable. II. The judgment in any such action or issue as may be directed by the Court or Judge, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties, and all persons

* *Halton v. Guntrip*, 3 M. & W., 145; *Isaac v. Spilsbury*, 10 Bing., 3.

† The remedy now extends to “all actions.”

‡ Now after service of writ.

§ The application is made to a Judge by *summons* at chambers, and is always supported by an affidavit which sets forth in the case of a defendant (1) the facts of the claim, (2) that the defendant does not claim any interest in the subject-matter of the claim, and (3) that he does not collude with the other parties. Where a sheriff applies, an affidavit of facts only is necessary.

**Order I.,
Rule 2.**

claiming by, from, or under them.* III. If such third party shall not appear under such rule or order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the Court or Judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; saving, nevertheless, the right or claim of such third party against the plaintiff; and thereupon to make such order between such defendant and the plaintiffs, as to costs and other matters, as may appear just and reasonable. IV. No order shall be made in pursuance of this Act by a single Judge of the Court of Pleas of the said County Palatine of Durham who shall not also be a Judge of one of the said Courts at Westminster, and every order to be made in pursuance of this Act by a single Judge not sitting in open Court shall be liable to be rescinded or altered by the Court in like manner as other orders made by a single Judge. V. If upon application to a Judge, in the first instance, or in any later stage of the proceedings, he shall think the matter more fit for the decision of the Court, it shall be lawful for him to refer the matter to the Court; and thereupon the Court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by Rule of Court, instead of the order of a Judge. VI. And whereas difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said Courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons not being the parties against whom such process has issued, whereby Sheriffs and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection in such cases to such Sheriffs and other officers; Be it therefore further enacted, That when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the Court from which such process issued, upon application of such Sheriff or other officer made before or after the return of such process, and as well before as after any action brought against such Sheriff, or other officer, to call before them, by Rule of Court, as well the party issuing such process as the party making such claim, and thereupon to exercise, for the adjustment of such claims and the relief and protection of the Sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case, and the costs of all such proceedings shall be in the discretion of the Court. VII. All rules, orders, matters, and decisions to be made and done in pursuance of this Act, except only the affidavits to be filed, may together with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments; and in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by *fiere facias* or *capias ad satisfaciendum*,

* See s. 17 of the C. L. Pro. Act, 1860, *infra*.

adapted to the case, together with the costs of such entry, and of the execution if by *fiery facias*; and such writ or writs may bear *teste* on the day of issuing the same, whether in term or vacation; and the Sheriff or other officer executing any such writ shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the Court. VIII. And whereas by a certain Act made and passed in the last Session of Parliament, intituled, *An Act to improve the Proceedings in Prohibition and on Writs of Mandamus*, it was among other things enacted, that it should be lawful for the Court to which application may be made for any such Writ of Mandamus, as is therein in that behalf mentioned, to make rules and orders calling not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to show cause against the issuing of such writ and payment of the costs of the application, and upon the appearance of such other person in compliance with such rules, or, in default of appearance, after service thereof, to exercise all such powers and authorities, and make all such rules and orders applicable to the case, as were or might be given or mentioned by or in any Act passed or to be passed during that present Session of Parliament for giving relief against adverse claims made upon persons having no interest in the subject of such claims; and whereas no such Act was passed during the then present Session of Parliament; Be it therefore enacted, that upon any such application as is in the said Act and hereinbefore mentioned, it shall be lawful for the Court to exercise all such powers and authorities, and make all such rules and orders applicable to the case, as are given or mentioned by or in this present Act."

The Common Law Procedure Act, 1860* (23 & 24 Vict. c. 126), contains the following provisions respecting "Interpleader Proceedings," in ss. 12 to 18:—

"XII. Where an action has been commenced in respect of a Common Law claim for the recovery of money or goods, or where goods or chattels have been taken or are intended to be taken in execution under process issued from any one of the Superior Courts, or from the Court of Common Pleas at Lancaster or the Court of Pleas at Durham, and the defendant in such action, or the Sheriff or other officer, has applied for relief under the provisions of an Act made and passed in the Session of Parliament held in the first and second years of the reign of His late Majesty King William the Fourth, intituled, *An Act to enable Courts of Law to give Relief against adverse Claims made upon persons having no Interest in the Subject of such Claims*, it shall be lawful for the Court or a Judge to whom such application is made to exercise all the powers and authorities given to them by this Act and the hereinbefore mentioned Act passed in the Session of Parliament held in the first and second years of the Reign of His late Majesty King William the Fourth, though the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another. XIII. When goods or chattels have been seized in execution by a Sheriff or other officer under process of the above-mentioned Courts, and some third person claims to be entitled under a bill of sale or otherwise to such goods or chattels, by way of security for a debt, the Court or a Judge may order a

* This Act is, curiously enough, called an "Interpleader Act" in the present Rules.

**Order I.,
Rule 2.**

sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt, or otherwise, as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such Court or Judge may seem just. XIV. Upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the Court or Judge, wherever, from the smallness of the amount in dispute or of the value of the goods seized, it shall appear to them or him desirable and right so to do, at the request of either party, to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner, upon such terms as they or he shall think fit to impose, and to make such other rules and orders therein as to costs and all other matters as may be just. XV. In all cases of Interpleader proceedings, where the question is one of law, and the facts are not in dispute, the Judge shall be at liberty, at his discretion, to decide the question without directing an action or issue, and, if he shall think it desirable, to order that a special case be stated for the opinion of the Court. XVI. The proceedings upon such case shall, as nearly as may be, be the same as upon a special case stated under "The Common Law Procedure Act, 1852," an error may be brought upon a judgment upon such case; and the provisions of "The Common Law Procedure Act, 1854," as to bringing error upon a special case, shall apply to the proceedings in error upon a special case under this Act. XVII. The judgment in any such action or issue as may be directed by the Court or Judge in any Interpleader proceedings, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them. XVIII. All rules, orders, matters, and decisions to be made and done in Interpleader proceedings under this Act (excepting only any affidavits) may, together with the declaration in the cause, if any, be entered on record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment in the Superior Courts of Common Law."

See also the 1 & 2 Vict. c. 45, s. 2.

By section 25, subsection (6), of the Principal Act, if the debtor, trustee, or other person liable in respect of a debt or *chose in action* assigned as specified in that subsection, shall have had notice that the assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or *chose in action*, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to *interplead* concerning the same, although no action has been brought.*

A Master cannot (except by consent) exercise jurisdiction as to interpleader matters other than "such matters arising in interpleader as relate to practice only."†

On an interpleader summons at chambers, it was held by Lush, J., that the after-acquired property of the wife became vested at law as well as in equity in the trustees under an ante-nuptial settlement, containing a clause to the effect that all after-acquired property should so vest.‡ The

* See the cases cited in the note to this enactment, *supra*, pp. 69, 70.

† Order LIV., Rule.

‡ 1 Charley's Cases (Chambers), 31.

decision was based on the case of *Holroyd v. Marshall*,* decided by the House of Lords. "I am now bound," said Mr. Justice Lush, "to administer equity, and must therefore follow *Holroyd v. Marshall*; but," he added, "it seems to me a very mischievous thing to allow all after-acquired property to vest under a marriage settlement." The learned Judge then directed that the Sheriff must withdraw, the claimant being barred by the equity.

On another interpleader summons, at chambers, the same learned Judge held that, where there was a partnership account, the Sheriff must withdraw, the practice in writs of *fi. fa.*, where there is a partnership account, being the same in law and equity.†

The decision of Mr. Justice Lush as to the importation into law of the equitable doctrine respecting after-acquired property was, on an interpleader summons at chambers, subsequently followed by Mr. Justice Archibald, who held that after-acquired property passed under a bill of sale † purporting to pass it, the principle of the Common Law that such an instrument is void, as a transfer of property acquired since its execution, being now abrogated. "The Sheriff," said his lordship, "now seizes subject to the equities."‡

By the 1 & 2 Wm. IV. c. 58, s. 2, and the 23 & 24 Vict. c. 126, s. 17, which the present Rule incorporates, the decision of a Judge at chambers, *in a summary manner*,§ on an interpleader summons, is made "*final and conclusive* against the parties, and all persons claiming by, from, or under them." By section 50 of the Principal Act, on the other hand, "*every* order made by a Judge at chambers" (except orders made in the exercise of his discretion as to costs,) "may be set aside or discharged by a Divisional Court." Lindley, J., made an order at chambers, in the case of *Dodds v. Shepherd (Leatherdale Claimant)*, which was an interpleader summons, that the plaintiffs, the execution creditors, should withdraw from the possession of the goods (value £24), seized by the Sheriff of Middlesex, the learned Judge being of opinion that the claimant, Leatherdale, was entitled to them under a prior assignment of them for the benefit of the defendant's creditors generally. The learned Judge gave leave to appeal. Held, by the Divisional Court of the Exchequer Division (Bramwell, Amphlett, and Huddleston, BB.), that the appeal was barred by the 1 & 2 Wm. IV. c. 58, s. 2, and the 23 & 24 Vict. c. 126, s. 17, which are incorporated with the new "procedure and practice" by the present Rule.¶ In *Witt v. Parker*,¶ however, the Court of Appeal held that an appeal lay to it from an order of a Judge directing judgment to be entered for one of the parties in an interpleader issue.

If the claimant in any interpleader summons does not appear at the hearing, he will be barred of his claim.** Any remedy that the claimant

* 10 H. L. Cases, 191; 33 L. J. (Ch.), 193.

† 1 Charley's Cases (Chambers), 32.

‡ 2 Charley's Cases (Chambers), 12. See, further, as to Interpleader, Day's Common Law Procedure Acts, 4th section [1872], pp. 353-364; Coe's Practice of the Judges' Chambers, pp. 151-159.

§ So, also, the judgment in any action or issue directed by the Judge to be tried.

¶ *Dodds v. Shepherd (Leatherdale Claimant)*, 1 Ex. D., 75; 24 W. R., 322; 34 L. T., 358; 2 Charley's Cases (Court), 173. ¶ 25 W. R., 518.

** *Lambert v. Cooper*, 5 Dowl., 547; *Jones v. Lewis*, 8 M. & W., 264. See, also, 1 & 2 Wm. IV. c. 58, s. 3.

Order I.,
Rule 2.

in Sheriff's interpleader may have against the execution creditor will, however, be still left open.*

If the claimant appears, and the question is one of fact, the Judge, instead of deciding the matter summarily,† may order an issue to be tried, and may, in interpleader between persons generally, direct who shall be plaintiff and who defendant; in Sheriff's interpleader, if an issue is ordered to be tried, the execution creditor is made defendant, and the claimant plaintiff.‡

The judge may, if he prefers it, order the claimant, in interpleader between persons generally, to make himself defendant in the original or in some other action.§

As to the form of order where *an issue* is directed to be tried on a Sheriff's interpleader summons, see Coe's "Practice of the Judges' Chambers," p. 153.

The Judge may, if the question is simply one of *law*, decide it himself, or order a special case to be stated for the opinion of the Court.||

Rule 3.

All other proceedings in and applications to the High Court may, subject to these Rules, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if the Act had not been made.

See section 21 of this Act, *supra*, which this Rule follows.

"All other proceedings and applications." For illustrations of such "proceedings and applications," the reader may see and consider *In Re Phillips and Gill*,¶ in the Queen's Bench Division, and *In the goods of Cartwright*,** in the Probate Division. The applications in these cases were held not to be "actions" within Order LIII., Rules 1 and 2, of the Rules of the Supreme Court, and the old practice was, therefore, held to apply under the present Rule.

ORDER II.

WRIT OF SUMMONS AND PROCEDURE, &c.

Rule 1.

Every action in the High Court shall be commenced

* *Ford v. Dilly*, 5 B. & Ad., 885.

† *I.e.*, under sect. 14 of the Common Law Procedure Act, 1860, as in *Dodds v. Shepherd*, *supra*.

‡ 1 & 2 Wm. IV. c. 58, s. 1. § *Ib.*

|| Common Law Procedure Act, 1860, s. 15.

¶ 1 Q. B. D., 78; 45 L. J., Q. B., 136; 24 W. R., 158; 1 Charley's Cases (Court), 157.

** 34 L. T., 72; 24 W. R., 214.

by a writ of summons, which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and which shall specify the Division of the High Court to which it is intended that the action should be assigned.

Order II.,
Rule 1.

This Rule is a re-enactment of Rule 2 of the Principal Act, which is founded on section 2 of the C.L.P. Act, 1852. See Order III., Rule 2, *infra*, as to the endorsement required by this Rule. Forms of such indorsements will be found in Part II. of Appendix (A). See sections 33 and 42 of the Principal Act, as to marking "the name of the Division," and in the Chancery Division "the name of the Judge," also.

The writ of summons also contains a vacant space for the letter and number of the action, pursuant to Order V., Rule 8. In other particulars, except as to *teste* (see Rule 8), it follows sections 2-6 of the Common Law Procedure Act, 1858.

By Order V., Rule 5, the writ of summons must be printed on the paper, in the type and with the margin specified by Order LVI., Rule 2, *infra*.

The commencement of an action in the Chancery Division by a writ of summons is a great departure from the former practice in suits in the Court of Chancery. The first step in the institution of a suit in the Court of Chancery has since the 1st of November, 1852, been to prepare the Bill of Complaint, and deliver it to the Clerk of Records and Writs, who thereupon filed it, by writing on it the date and a number, and then, and not till then, did the plaintiffs proceed to bring the defendants before the Court, by serving them, and this, not by serving them with a writ, but with a printed copy of the Bill.

This Rule must be taken to completely repeal section 3 of the Chancery Amendment Act, 1852.*

By Order XXVII., Rule 11, the Court or a Judge may, at any stage of the proceedings allow the plaintiff to amend the writ of summons, as may seem just.

Rule 2.

Any costs occasioned by the use of any more prolix or

* The form in the Schedule runs thus:—

"VICTORIA R.

"To the within-named Defendant *C.D.*, greeting.

"We command you ['and every of you' *where there is more than one Defendant*], That within Eight Days after Service hereof on you, exclusive of the Day of such Service, you cause an appearance to be entered for you in our High Court of Chancery to the within Bill of Complaint of the within-named *A.B.*, and that you observe what our said Court shall direct. Witness Ourselves at Westminster, the
Day of _____ in the _____ Year of Our
Reign.

"Note.—If you fail to comply with the above Directions you will be liable to be arrested and imprisoned.

"Appearances are to be entered at the Record and Writ Clerks' Office, Chancery Lane, London."

Order II,
Rule 2.

other forms of writs, and of indorsements thereon, than the forms hereinafter prescribed, shall be borne by the party using the same, unless the Court shall otherwise direct.

This Rule is a re-enactment of Rule 3 of the Principal Act, with the omission of the initial words, "Forms of writs and of indorsements thereon, applicable to the several ordinary causes of action, shall be prescribed by the Rules of Court," and the addition of the words, "than the forms hereinafter described," so as to adapt the Rule to the present Act.

As to disallowing the costs of improper, unnecessary, or unnecessarily long pleadings, see the Rules of the Supreme Court (Costs), "Special Allowances and General Provisions," Rule 18, *infra*, under which the Court or a Judge may direct the taxing-master to disallow the costs of such pleadings, or the taxing-master may himself disallow them. See, also, Order LV. of the Rules of the Supreme Court and the note thereto, *infra*, as to costs generally.

By Order XIX. of these Rules, Rule 2, *infra*, the statements of claim and of defence, and the reply and any set-off, or counterclaim, must be "as brief as the nature of the case will admit; and the Court, in adjusting the costs, shall inquire, at the instance of any party, into any unnecessary *prolixity*, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same."

Rule 3.

The writ of summons for the commencement of an action shall, except in the cases in which any different form is hereinafter provided, be in Form No. 1 in Part I. of Appendix (A), hereto, with such variations as circumstances may require.

See the note to Order VIII., Rule 1, as to an error in the form.

Compare the 2nd section of the Common Law Procedure Act, 1852. The words, "with such variations as circumstances may require," appear to have been introduced with a view to relaxing the stringency of the rule that the writ of summons must be in the prescribed form.* The form of writ is copied from No. 1 of Schedule (A) of the Common Law Procedure Act, 1852, with the necessary alterations to adapt it to the Principal Act, and this Act, the more remarkable being (1) the addition of a notice to the defendant that he may appear by entering an appearance either personally or by solicitor at [blank] office, at [blank] place; and (2) the indorsement of the plaintiff's claim. See as to the latter, the forms in Part II., sections 2, 4, &c., of Appendix (A).

The writ of summons in ejectment is now the same as in other actions. (See Order XII., Rule 18.)

The Record and Writ Clerks, on the 1st of February, 1876, issued a notice, intimating that considerable confusion had arisen from the practice of adding after the issue of the writ, in the Chancery Division, a title "In the Matter of the Estate, &c.," and requesting solicitors in all actions for *administration*, to intitule the writ thus: "In the Matter

* See Day's Common Law Procedure Acts, p. 30.

of the Estate, &c., between C D plaintiff and E F defendant." It would thus, they said, become possible to index these actions in the Cause Book under the name of the estate to be administered.

**Order II.
Rule 3.**

Rule 3a.

Forms 2 and 3 in Part I. of Appendix (A) to the Rules of the Supreme Court, shall be read as if the words "by leave of the Court or a Judge" were not therein.

This is a new Rule, added to this Order by the Rules of the Supreme Court, June, 1876, Rule 2, on account of the decisions of the Queen's Bench in *Scott v. The Royal Wax Candle Company*,* and of Vice-Chancellor Hall in *Bacon v. Turner*,† which are noted under the next Rule.

Rule 4.

No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of a Court or Judge.

See Order XI. of these Rules, *infra*.

The sections of the Common Law Procedure Act, 1852, dealing with the question of writs for service out of the jurisdiction, or where notice is to be given out of the jurisdiction, are the 18th and 19th, which see.

It will be seen from a reference to the form of the writ—Appendix (A), Part I., Form No. 2—that the number of days to be specified in the body of the writ, for entering an appearance, is not left as formerly to the plaintiff to select, but is to be filled up "as directed by the Court or a Judge ordering the service or notice." It certainly seems more fair to the defendant that the court or a judge should fix the time than the plaintiff. The time will, no doubt, as hitherto, be "regulated by the distance from England of the place where the defendant is residing."‡

By Order XI. of these Rules, Rule 3, the application for leave must be supported "by affidavit or otherwise."

It has been decided by Vice-Chancellor Hall that an application for leave to serve a writ of summons out of the jurisdiction must in all cases be supported by an affidavit; and that the order giving leave should also provide for service of the interrogatories (if any filed), and for the issuing of the injunction (if any applied for). The expenses of several applications are thus saved and delay is avoided.§

* 1 Q. B. D., 404; 45 L. J. (Q. B.), 586; 34 L. T., 683; 24 W. R., 668; 2 Charley's Cases (Court), 179.

† 1 Ch. D., 275; 34 L. T., 349; 24 W. R., 637; 2 Charley's Cases (Court), 184,

15 & 16 Vict. c. 76, s. 18.

§ *Young v. Brassey*, 1 Ch. D., 277; 45 L. J. (Ch.), 142; 24 W. R., 110; 1 Charley's Cases (Court), 88.

Order II.,
Rule 4.

The same learned Judge has decided that the leave of the Court must be obtained for the issue of a writ of summons from a District Registry, when it is intended to give notice of it out of the jurisdiction, in lieu of serving it out of the jurisdiction.*

In *Scott v. The Royal Wax Candle Company*,† the advantages which accrue to a plaintiff, who is suing foreigners abroad, from the present Rule were forcibly illustrated. The plaintiff in that case issued a writ of summons in the Form No. 2, in part I. of Appendix (A), and served notice of the writ on the defendants, a foreign corporation, he having, prior to issuing the writ, obtained leave of a Judge at chambers to issue it under the present Rule. The notice was in the Form 3, in Part I. of Appendix (A). The time mentioned in the notice having expired, the plaintiff signed interlocutory judgment under Order XIII. of these Rules, Rule 6, the claim being for damages for breach of contract. The defendant, in moving to set aside the judgment, relied on the circumstance that the plaintiff had signed judgment *without leave*, although the writ of summons and the notice of it served upon the defendants informed them that it was “*by leave of the Court or a Judge*,” and not otherwise, that the plaintiff could sign judgment. The Court held that no leave was necessary, under the Supreme Court of Judicature Acts, to enable a plaintiff to sign judgment in default of the defendants appearing. Having obtained leave to issue the writ, under the provisions of the present Rule, the plaintiff was entitled to sign judgment for default of appearance, without any *further* leave. As, however, the Forms No. 2 and 3 of Part I. of Appendix (A), which both contained the words “*by leave of the Court or a Judge*,” were calculated to mislead the defendants, the Court set aside the judgment to enable them to appear and defend upon the merits.

In the case of *Bacon v. Turner*,‡ in which the plaintiff applied for leave to issue a writ of summons, notice of which it was intended to serve on the defendants, a foreigner and his wife, Vice-Chancellor Hall said, “You may issue and serve notice of the writ, amended by omitting the words, ‘*by leave of the Court or a Judge*.’ I shall follow *Scott v. The Royal Wax Candle Company*.”

In consequence of these decisions, the last of which was given in May, 1876, the Rules of the Supreme Court, June, 1876, provided (Rule 2) that Forms 2 and 3 in Part I. of Appendix (A) to the Rules of the Supreme Court shall be read as if the words “*by leave of the Court or a Judge*” were not therein.§

An interesting point in pleading was decided in the case of *Preston v. Lamont*.|| It was raised by an application to the Exchequer Division to strike out the statement of defence, which was as follows:—“That the action was commenced on the 18th of January, 1876, by a writ in the form given in the Rules of Court, 1875, Appendix (A), Part I., Form 2, under colour of Order II., Rules 4 and 5, and was served on the defendants,

* *Meek v. Michaelsen*, W. N., 1876, p. 111; 2 Charley's Cases (Court).

† 1 Q. B. D., 404; 45 L. J. (Q.B.), 586; 34 L. T., 683; 24 W. R., 668; 2 Charley's Cases (Court), 179.

‡ 1 Ch. D., 275; 34 L. T., 349; 24 W. R., 637; 2 Charley's Cases (Court), 184.

§ Rule 2 of the Rules of the Supreme Court, June, 1876, is inserted, *supra*, as Rule 3a of this Order.

|| 1 Ex. D., 361; 24 W. R., 928; 34 L. T., 341; 2 Charley's Cases (Court), 185.

in Scotland; that the action was brought for breach of a contract made at Glasgow, and out of the jurisdiction of this Court; that there was never any breach of it within the jurisdiction, and that none of the circumstances mentioned in Order XI., Rule 1, existed; that the defendants were born in Scotland, Scottish subjects of the Queen, and of parents who were also such subjects, and were long before, and at the time of, and ever since the issuing of the writ, domiciled and resident in Scotland alone, and had not been during the same period resident or domiciled in England, or within the jurisdiction, and were entitled to all the privileges and immunities secured to the Scottish subjects of the Queen." The statement of defence also alleged that the action was properly within the jurisdiction of the Scottish Courts. The plaintiffs had, on the 18th of January, 1876, obtained leave from Lindley, J., at chambers, under the present Rule to issue the writ. The Court, Bramwell and Amphlett, BB., decided that the application of the plaintiff to strike out the statement of defence must be acceded to. The plea set up by it was not a plea to the jurisdiction at all, but *a plea to the issuing of the writ*. The Judge at chambers had a discretionary power of granting or refusing the application for leave to issue the writ under the present Rule. From his decision on that point an appeal lies. Subject to such appeal, the decision of the Judge at chambers is final upon the point, and the defendant must defend the action on the merits. "Both convenience and justice," said Mr. Baron Amphlett, "concur in requiring that such a question should not be allowed to be the subject of a plea or of a statement of defence."

The Master of the Rolls has refused leave to issue a writ under the present Rule, where it was intended to serve notice of it on the Sultan of Turkey. The Sultan could be named as a party, if he desired it, but the writ would be inoperative against him. To serve it on the Turkish Ambassador would be contrary to the comity of nations.*

The present Rule is a great improvement on the former practice under the 18th and 19th sections of the Common Law Procedure Act, 1852. The "leave" under those enactments was a "leave to proceed in the action" *after* service of the writ out of the jurisdiction; and if it appeared *then* that the cause of action did not arise within the jurisdiction, the Court set aside the writ and service;† so that in such a case the plaintiff had all the trouble and expense of issuing and serving the writ to no purpose. Under the present Rule the application for "leave" is an application for "leave to issue the writ;" and on such an application it is the duty of the Judge at chambers to decide whether the action is one which falls within the provisions of Order XI., Rule 1, *infra*. The Judge's decision on this point is, as we have seen (subject, only, to appeal) final, and the validity of the writ and service cannot subsequently be questioned.

Rule 5.

A writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be in Form No. 2 in Part I. of Appendix

* *Stewart v. The Bank of England*, W. N., 1876, p. 263; 11 N. C., p. 187, *nomine*, *Stewart v. The Sultan of Turkey*.

† *Binet v. Picot*, 4 H. & N., 365.

Order II.,
Rule 5.

(A) hereto, with such variations as circumstances may require. Such notice shall be in Form No. 3 in the same part, with such variations as circumstances may require.

The forms of the writ and notice of writ in lieu of service are copied from Nos. 2 and 3 of the Schedule (A) in the Common Law Procedure Act, 1852. From a reference to the Form No. 2, it is evident that the former practice, which requires service of a copy of the writ in the case of a British subject residing out of the jurisdiction, and service of notice of the writ in the case of a foreigner resident out of the jurisdiction (see ss. 18 and 19 of the Common Law Procedure Act, 1852), is to be continued.

The indorsements on the writ are to be "copied in full" into the form of notice of the writ, No. 3.

See, as to the alteration effected by Rules of Court in the Forms No. 2 and No. 3 in Part I. of Appendix (A), Rule 3a of this Order, and the note to Rule 4 of this Order, *supra*.

Rule 6.

With respect to actions upon a bill of exchange or promissory note, commenced within six months after the same shall have become due and payable, the procedure under the Bills of Exchange Act, 18 & 19 Vict. c. 67, shall continue to be used.

The Summary Procedure on Bills of Exchange Act, 1855 (18 and 19 Vict. c. 67), is as follows:—

"Whereas *bonâ fide* holders of dishonoured bills of exchange and promissory notes are often unjustly delayed and put to unnecessary expense in recovering the amount thereof by reason of frivolous or fictitious defences to actions thereon, and it is expedient that greater facilities than now exist should be given for the recovery of money due on such bills and notes: Be it enacted, by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows:

"I. From and after the twenty-fourth day of October, one thousand eight hundred and fifty-five, all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become due and payable, may be by writ of summons in the special form contained in Schedule A. to this Act annexed, and endorsed as therein mentioned; and it shall be lawful for the plaintiff, on filing an affidavit of personal service of such writ within the jurisdiction of the Court, or an order for leave to proceed as provided by the Common Law Procedure Act, 1852,* and a copy of the writ of summons and the indorsement thereon, in case the defendant shall not have obtained leave to appear and have appeared to each writ according to the exigency

* Section 17.

thereof, at once to sign final judgment in the form contained in Schedule B. to this Act annexed (on which judgment no proceeding in error shall lie) for any sum not exceeding the sum indorsed on the writ, together with interest, at the rate specified (if any) to the date of the judgment, and a sum for costs to be fixed by the Masters of the Superior Courts or any three of them, subject to the approval of the Judges thereof or any eight of them (of whom the Lord Chief Justices and the Lord Chief Baron shall be three), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way, and the plaintiff may upon such judgment issue execution forthwith. II. A Judge of any of the said Courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ, and to defend the action, on the defendant paying into Court the sum endorsed on the writ, or upon affidavits satisfactory to the Judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the Judge may seem fit. III. After judgment, the Court or a Judge may, under special circumstances, set aside the judgment, and, if necessary, stay or set aside execution, and may give leave to appear to the writ, and to defend the action, if it shall appear to be reasonable to the Court or Judge so to do, and on such terms as to the Court or Judge may seem just. IV. In any proceeding under this Act it shall be competent to the Court or a Judge to order the bill or note sought to be proceeded upon to be forthwith deposited with an officer of the Court, and further to order that all proceedings shall be stayed until the plaintiff shall have given security for the costs thereof. V. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment or otherwise, by reason of such dishonour, as he has under this Act for the recovery of the amount of such bill or note. VI. The holder of any bill of exchange or promissory note may, if he think fit, issue one writ of summons, according to this Act, against all or any number of the parties to such bill or note, and such writ of summons shall be the commencement of an action or actions against the parties therein named respectively, and all subsequent proceedings against such respective parties shall be in like manner, so far as may be, as if separate writs of summons had been issued. VII. The provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and all Rules made under or by virtue of either of the said Acts, shall, so far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under this Act. IX.* It shall be lawful for Her Majesty from time to time, by an order in Council, to direct that all or any part of the provisions of this Act shall apply to all or any Court or Courts of Record in England and Wales, and within one month after such order shall have been made and published in the "London Gazette," such provisions shall extend and apply in manner directed by such order, and any such order may be, in like manner, from time to time altered and annulled; and in and by any such order Her Majesty may direct by whom any powers or duties incident to the provisions applied under this Act shall and may be exercised with respect to matters in such Court or Courts, and may make any orders or regulations

* Section VIII. relates to the abolished Courts of Pleas at Lancaster and Durham.

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Order II,
Rule 6.

which may be deemed requisite for carrying into operation in such Court or Courts the provisions so applied.* X. Nothing in this Act shall extend to Ireland or Scotland. XI. In citing this Act in any instrument, document, or proceedings, it shall be sufficient to use the expression 'The Summary Procedure on Bills of Exchange Act, 1855.'"

"Schedules referred to in the foregoing Act.

"A.

"Victoria, by the grace of God, &c.

"To C.D., of , in the county of

We warn you, that unless within twelve days after the service of this writ on you, inclusive of the day of such service, you obtain leave from one of the Judges of [Her Majesty's High Court of Justice] to appear, and do within that time appear in our [High] Court of [Justice] in an action at the suit of A.B., the said A.B. may proceed to judgment and execution.

"Witness, &c.

"Memorandum to be subscribed on the writ.

"N.B.—This writ is to be served within six calendar months from the date thereof, or if renewed, from the date of such renewal, including the day of such date, and not afterwards.

"Indorsement to be made on the writ before service thereof.

"This writ was issued by E.F., of , attorney for the plaintiff. Or, This writ was issued in person by A.B., who resides at [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence.]

"Indorsement.

"The plaintiff claims [pounds principal and interest], or pounds balance of principal and interest due to him as the payee [or indorsee] of a bill of exchange or promissory note, of which the following is a copy :—

[Here copy bill of exchange or promissory note, and all indorsements upon it.] [And also for noting, and £ for costs.†]

And if the amount thereof be paid to the plaintiff or his attorney within days from the service hereof, further proceedings will be stayed.

"Notice.

"Take notice, that if the defendant do not obtain leave from one of the Judges of the Court, within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do [not] † within such time cause an appearance to be entered for him in the Court out of which this writ issues, the plaintiff will be at liberty at any time after the expiration of such twelve days to sign final judgment for any sum not exceeding the sum above claimed, and the sum of pounds for costs, and issue execution for the same.

"Leave to appear may be obtained on an application at the Judges' Chambers, Serjeants' Inn, London, supported by affidavit showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action.

* See Order XXXVII., Rules 47, 48 and 49, of the new County Court Rules.

† Reg. Gen. Nov. 26, 1855.

"Indorsement to be made on the writ after service thereof.

Order II.,
Rule 6.

"This writ was served by X. Y. on L. M. (the defendant the
defendant), on Monday the day of 18
"By X. Y.

"B.

In the [High Court of Justice.]

"On the day of in the year of our Lord 18
[Day of signing judgment.]

"England (to wit). A. B. in his own person [or by his
attorney] sued out a writ against C. D., indorsed as follows:—

"[Here copy indorsement of plaintiff's claim.]
and the said C. D. has not appeared:

"Therefore it is considered that the said A. B. recover against the said
C. D. pounds, together with pounds for costs
of suit."

Mr. Justice Quain, at chambers, decided that the writ of summons in
an action under the Bills of Exchange Act must be served *personally* on
partners. Order IX., Rule 6, does not apply.*

A defendant, by appearing in a District Registry in an action under the
Bills of Exchange Act, waives the objection that proceedings in such an
action cannot be taken there.†

Where in an action on a Bill of Exchange the defendant denied the
alleged consideration for the bill, leave was given to him to appear under
the Bills of Exchange Act.‡

In the case of *Oger v. Bradnum*§ a writ of summons was issued in the form
given in Schedule (A) of "The Summary Procedure on Bills of Exchange
Act, 1855" (18 & 19 Vict. c. 67), with the exception that the notice
indorsed upon the writ was varied as follows:—"Take notice, that if the
defendant do not obtain leave from the *District Registrar at Manchester*
within twelve days after having been served with this writ, inclusive of
the day of such service, to appear thereto, and do not within such time
cause an appearance to be entered for him in the *Office of such District
Registry*, the plaintiff will be at liberty, at any time after the expiration of
such twelve days, to sign final judgment for any sum not exceeding the
sum above claimed, with interest as above specified, the sum of £4, or
such further sum as shall on taxation be allowed for costs, and issue exe-
cution for the same. Leave to appear may be obtained on application
at the *Office of the Registrar for the Manchester District, 57, King Street,
Manchester*, supported by affidavit shewing that there is a defence to the
action on the merits, and that it is reasonable that the defendant shall be
allowed to appear in the action." The defendant did not reside or carry on
business within the Manchester District. The Court of Common Pleas held
that the writ of summons indorsed in the manner already stated, was a

* 1 Charley's Cases (Chambers), 32.

† *Ibbotson v. Whitworth*, 1 Charley's Cases (Chambers), 33.

‡ 2 Charley's Cases (Chambers), 15.

§ (At Chambers), 1 Charley's Cases (Chambers), 13. (In Court), 1 C. P.
D., 334; 45 L. J. (C. P.), 273; 34 L. T., 578; 24 W. R., 404; 2 Charley's
Cases (Court), 132.

**Order II,
Rule 6.**

good writ; that the writ was properly issued out of the District Registry;* and that it was unnecessary to give the defendant notice that he had the option of appearing in London; as he must apply in the first instance to the Registrar, at the District Registry, for leave to appear. "The only way," said Mr. Justice Brett, "to construe the Acts is to say that a writ under the Bills of Exchange Act is a writ under the Supreme Court of Judicature Acts, subject, however, to the conditions imposed by the Bills of Exchange Act."

One of the conditions imposed by the "Summary Procedure on Bills of Exchange Act, 1855," it will be perceived, is that (s. 1) *personal* service of the writ of summons on the defendant must be effected. In the case of *Pollock v. Campbell Brothers*,† *personal* service on the defendants had not been effected, and the defendants had not obtained leave to appear nor appeared. The plaintiffs attempted to sign judgment on an affidavit by a clerk of their solicitors, that the writ was served by him upon "a person having at the time of service in the control or management of the defendant's partnership business at the principal place, within the jurisdiction, of the business of the defendants' partnership," pursuant to Order IX., Rule 6, *infra*. The Court held that personal service on each of the defendants was necessary, and the plaintiffs must prove that it had been effected before they could sign final judgment. "Signing final judgment," said Lord Chief Baron Kelly, "is as much a part of 'procedure under the Bills of Exchange Act,' as issuing and indorsing the writ itself." "The practice under that 'procedure,'" said Mr. Baron Cleasby, "must be very strictly observed."‡

Rule 7.

The writ of summons in every Admiralty action in rem shall be in Form No. 4 of Part I. of Appendix (A) hereto, with such variations as circumstances may require.

An Action in *personam* in the Court of Admiralty was commenced by a citation in *personam*, addressed to the defendant, and somewhat resembling in its contents an ordinary writ of summons in the Superior Courts of Common Law; instead of being tested by a Judge, it was signed by the Registrar. As no mention is made of the citation in *personam* in these Rules it must be assumed that it is abolished, and the forms of writ applicable to the other Divisions are applicable to it.

The writ of summons under this Rule is addressed "to the owners and parties interested in the ship or vessel of the port of, &c., or cargo" (as the case may be), and commands them to appear within eight days. The "warrant" formerly commanded the Marshal and his substitutes to cite

* This was so decided on the strength of s. 64 of the Principal Act, Order V., Rule 1, and Order XXXV., Rule 1.

† 1 Ex. D., 50; 45 L. J. (Ex.), 199; 34 L. T., 360; 24 W. R., 320; 2 Charley's Cases (Court), 191.

‡ S. 1 of the Summary Procedure on Bills of Exchange Act, 1855, gives an *alternative* of "filing an order for leave to proceed as provided by the C. L. Proc. Act, 1852," but, as Huddleston, B., pointed out, this necessitates "an application upon proper materials at chambers," which, as a matter of fact, had not been made. See, further, Charley's Cases (Chambers), 63, 123 (vol. 1); 2, 4, 5, 11, 23, 53 (vol. 2).

all persons having or claiming to have any right, title, or interest to appear within six days.

Order II,
Rule 7.

It has been found expedient to alter the form of a writ of summons in an Admiralty action *in rem*, so as to assimilate it, as much as possible, to an ordinary writ of summons. The authorisation to the "officer of the Supreme Court," to arrest the ship, or vessel, or cargo, has been omitted from the writ, and appears as a separate form. An elaborate affidavit was originally required before the writ could be issued, by Order V., Rule 11, *infra*; but this was altered by Order V., Rule 11a (Rule 3 of the Rules of the Supreme Court, December, 1875), which repealed the first paragraph of that Rule, and did away with the necessity for an affidavit as a necessary preliminary to the issuing of the writ. An affidavit was only to be necessary before issuing a warrant of arrest. Rule 3 of the Rules of the Supreme Court, December, 1875, and the form of warrant of arrest annexed to it, were annulled by Order V., Rule 11b (Rule 4 of the Rules of the Supreme Court, February, 1876), but were literally reproduced with the omission of the words from the Rule limiting the power of issuing the warrant of arrest to "the Principal Registry in London," and, with an addition to the form, giving "Collectors of Customs" at seaports the same power as "the Marshal of the Admiralty Division of the High Court," to effect the arrest.

Rule 7a.

Form A. in the Appendix to these Rules shall be subject for the form referred to in Order II., Rule 7, of "The Rules of the Supreme Court."

This is a new Rule added by the Rules of the Supreme Court, December, 1875, Rule 2. The new form of a writ of summons in an Admiralty action *in rem* will be found inserted in its proper place immediately after Form No. 4 of Part I. of Appendix (A), *infra*, mentioned in Rule 7, *supra*.

Rule 8.

Every writ of summons, and also every other writ, shall bear date on the day on which the same shall be issued,* and shall be tested in the name of the Lord¹ Chancellor, or, if the office of Lord Chancellor shall be vacant, in the name of the Lord Chief Justice of England.

This Rule distinctly repeals s. 5 of the Common Law Procedure Act, 1852, which provides that "Every writ of summons shall be tested in the name of the Lord Chief Justice and Lord Chief Baron of the Court from which the same shall issue, or in case of a vacancy of such office, then in the name of a senior Judge of the said Courts." The Editor of the Revised Statutes, however, has allowed the repealed section to remain upon the Statute Book.†

The form of *teste* of writs gave occasion to a sharp controversy between.

* See Order V., Rule 6.

† The Statutes, Revised Edition, Vol. XI., p. 381.

**Order II.,
Rule 8**

the Record and Writ Clerks of the Chancery Division, and the Masters of the Queen's Bench, Common Pleas and Exchequer Divisions of the High Court, in which the latter were successful. The Record and Writ Clerks were of opinion that the form of *teste*, contained in the Chancery writs and reproduced to some extent in the forms of writs of execution in Appendix (F), should be adopted. The new form of *teste* of writs would then have run as follows:—"Witness Ourselves at Westminster the day of in the year of Our Reign.

"CAIRNS, C."

The Masters, however, founded themselves upon the express direction of the present Rule, that "the writ shall be tested *in the name* of the Lord Chancellor," and the Chancery writ, they insisted, was tested, not in the name of the Lord Chancellor, but in that of the Queen. Much confusion arose from this difference of opinion during the first week of the month of November, 1875; but the Masters finally triumphed by absolutely refusing to seal any writ which was not tested as follows:—"Witness the Right Honourable Hugh McCalmont Baron Cairns, Lord High Chancellor of Great Britain, at Westminster, this day of 187 ." The prefix, "the Right Honourable," was subsequently dropped, and with this omission the above became, and still continues to be, the recognized form.

ORDER III.

INDORSEMENTS OF CLAIM.

Rule 1.

The indorsement of claim shall be made on every writ of summons before it is issued.

The indorsement of a claim on the writ of summons *in every case* is one of the peculiar features of the system of procedure introduced by the Supreme Court of Judicature Acts. By section 8 of the Common Law Procedure Act, 1852, it is provided that "upon the writ and copy of any writ served *for the payment of any debt*, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for costs." It has been expressly decided* that if a plaintiff claims both a debt and damages—a *fortiori*, if he claims damages only—he need not indorse the amount of his claim on the writ. The claim must now in *all* cases be indorsed. On a reference to the forms headed "damages and other claims" in Appendix (A), Part II., section 4, it will be seen that the *amount* of the claim is not to be indorsed where the claim is for damages, and not for a debt. The expression used is, "The plaintiff's claim is for damages," without stating the amount. The difficulty which arose in cases of actions for breaches of conditions in bonds, as to fixing the precise amount of the claim, regarded as in the nature of a debt,† cannot arise under the new system, as the *amount* of the claim is left perfectly open, while the *nature* of the claim is stated.

* *Perry v. Patchett*, 2 Dowl., 667. This was an action for the value of a stack of hay, and also for damages over for the illegal distraint of it.

† See *Rowland v. Dakeyne*, 2 Dowl., 832; *Smart v. Lovett*, 3 Dowl., 34.

Where the defendant fails to appear, the indorsement upon the writ, although not what is technically called "special," takes the place practically of a statement of claim. See Order XIII. of these Rules, Rules 5 and 6. As to special indorsements, see Rule 6 of this Order, *infra*.

Order III.,
Rule 1.

Where a writ has not been specially indorsed, it would seem that the provisions of Rule 19 of the Reg. Gen., Hil. T., 1853, requiring a plaintiff to furnish "*particulars of his claim*," in cases falling under Schedule (B) of the Common Law Procedure Act, 1852, are still in force, notwithstanding the indorsement of the "*statement of claim*" under the present Rule. As to furnishing "*particulars of claim*," where the writ is specially indorsed, see the note to Rule 6 of this Order, *infra*.

Rule 2.

In the indorsement required by Order II., Rule 1, it shall not be essential to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled. The plaintiff may, by leave of the Court or Judge, amend such indorsement so as to extend it to any other cause of action, or any additional remedy or relief.

The indorsement, although not couched in "precise" language, gives the defendant *notice* of the general nature of the charge which the plaintiff intends to bring against him, and gives him an opportunity of availing himself of the knowledge so acquired, to effectuate a settlement.

The amendment sanctioned by this Rule, may extend the indorsement to "any other cause of action," or any "additional remedy or relief." Amendments under section 20 of the Common Law Procedure Act, 1852, only applied to such small matters as altering the date* to make it correspond with the *præcipe*, or putting in the christian names of defendants.† It is questionable whether the Court or a Judge would now entertain an application to "set aside the writ as irregular," under s. 20 of the Common Law Procedure Act, 1852. By Rule 11 of Order XXVII., "the Court or a Judge may, at any stage of the proceedings, allow the plaintiff to amend the writ of summons in such manner and on such terms as may be just."

An order of a Judge would seem to be hardly necessary to enable a plaintiff to amend the indorsement of a writ of summons *not yet served*. On an application, however, being made to Mr. Justice Lush, at chambers, for his direction on the point, his lordship "directed the applicant," it appears, "to take an order."‡

In the case of *Mathias v. Mathias*, Sir George Jessel, M.R., overruled an objection taken by the Record and Writ Clerk, that to enable him to amend the writ, after leave to amend it had been given, the order must have been formally drawn up. Sir George Jessel directed the

* *Kirk v. Dolby*, 6 M. & W., 636.

† *Rutherford v. Mein*, 2 Smith, 392.

‡ 1 Charley's Cases (Chambers), 34.

**Order III.,
Rule 2.**

Record and Writ Clerk to amend the writ, upon production of the brief in the case, indorsed by Counsel with the rough draft of the order initialed by the Registrar.*

A lady commenced an action for administration against her brother, with whom she was joint legatee, and who, being sole executor, had advertised a large part of the assets for sale and expressed (as alleged) an intention of leaving the country. The plaintiff indorsed upon her writ of summons a claim for administration only. Before service of the writ, she was allowed by Vice-Chancellor Hall on an *ex parte* application to amend the indorsement of the writ, so as to extend it to claims (1) for an injunction to restrain the defendant from receiving the proceeds of the sale, and (2) for a receiver. The indorsement of the writ having been so amended, the Vice-Chancellor granted an *interim* injunction.†

Rule 3.

The indorsement of claim may be to the effect of such of the Forms in Part II. of Appendix (A) hereto, as shall be applicable to the case, or, if none be found applicable, then such other similarly concise form as the nature of the case may require.

It will be seen that there are forms suitable for actions in the Chancery,‡ Probate,§ Admiralty,|| and Common Law Divisions¶ of the High Court.

Rule 4.

If the plaintiff sues, or the defendant or any of the defendants is sued in a representative capacity, the indorsement shall show, in manner appearing by the statement in Appendix (A) hereto, Part II., sec. VIII., or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued.

It will be perceived that in the forms referred to the word "as" is used before the particular word expressing the "capacity" in which the

* W.N., 1876, p. 214.

† *Colebourne v. Colebourne*, 1 Ch. D., 690; 45 L. J. (Ch.), 749; 24 W. R., 235.

‡ Section 1.

§ Section 5.

|| Section 6.

¶ Sections 2, 4, and 7. Solicitors are to charge and be allowed the fees set forth in the column headed "Lower Scale," in the Schedule to Order VI. of the Rules of the Supreme Court (Costs), in all actions for purposes to which any of the forms of indorsement of claim on writs of summons in sections 2, 4 and 7, or other similar forms, are applicable.

party sues or is sued. It was decided that if a plaintiff described himself thus, "A B executor," he might declare for a cause of action accruing to him in his own right, but that if he described himself, "A B as executor of C D," he could only declare for a cause of action accruing to him in that character.* It is apprehended that the present Rule will prevent a plaintiff from issuing a writ as if for a cause of action accruing to himself in his own right and then declaring *en auter droit*, a mode of proceeding which was formerly perfectly legal, though hardly fair to defendants.† Defendants have, also, a right to know in what capacity they themselves are sued.

Order III.,
Rule 4.

Rule 5.

In Probate actions the indorsements shall show whether the plaintiff claims as creditor, executor, administrator, residuary legatee, legatee, next of kin, heir-at-law, devisee, or in any and what other character.

By s. 100 of the principal Act (Interpretation Clause), "Probate Actions" include actions and other matters relating to the grant or recall of probate or of letters of administration other than common form business.

By the effect of Order I., Rule 1, and Order II., Rule 1, *supra*, all actions which formerly were commenced by citation or otherwise in the Court of Probate are to be instituted in the High Court by an ordinary writ of summons.

For the forms of indorsement in Probate actions, see section 5 of Part II. of Appendix (A.), *infra*.

Rule 6.

In all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, or on a guaranty, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, or on a trust, the writ of summons MAY be specially indorsed with the particu-

* *Anon., Executor, v. Anon.*, 1 Dowl., 97.

† See note to case last cited, and 2 Str., 1232 n. (1), *Ashworth v. Ryall*, 1 B. & Adol., 19 (misquoted "Ald." 1 Dowl. 98).

Order III.,
Rule 6.

lars of the amount sought to be recovered, after giving credit for any payment or set-off.

This Rule is a re-enactment of Rule 7 of the Principal Act, which is copied from s. 25 of the Common Law Procedure Act, 1852, the words "within the jurisdiction" being omitted, and "on a writ" added.

Forms of special indorsements under this Rule will be found in Appendix (A.), Part II., section 7. The late Mr. Justice Quain, at chambers, decided* that this being "a very special remedy," there could be no special indorsement, under the present Rule, of a writ served before this Act commenced. Mr. Baron Huddleston and Mr. Justice Lindley subsequently decided,† that where the writ was issued before, but renewed after, the commencement of this Act the present Rule applies.‡

See Order XIII., Rules 3 and 4, *infra*, as to signing final judgment in case of non-appearance when the writ is specially indorsed under this section.

The adoption of the Rule is optional, but its advantages are obvious.

As to calling on the defendant to show cause why the plaintiff should not be at liberty to sign final judgment, when the defendant appears on a writ specially indorsed under this Rule, see Order XIV., Rule 1a, *infra*. As to the delivery of a notice to the defendant that the plaintiff's claim is such as appears by the special indorsement, in lieu of delivering a statement of claim, when the writ is specially indorsed, see Order XXI., Rule 4, and Appendix (B.), Form No. 3, *infra*.

The adoption of the principle of the 25th section of the Common Law Procedure Act, 1852, was recommended by the Judicature Commission:—§

"In all cases in which the plaintiff seeks to recover a money demand, when founded upon a legal or equitable right, the practice established by the Common Law Procedure Act, 1852, should, we think, be adopted, and the writ should be specially indorsed with the amount sought to be recovered, and in default of appearance the plaintiff should be allowed to sign judgment for it"—(as to which see Order XIII., Rule 3).—"Further, in all cases in which a special indorsement has been made on a writ, and the defendant has appeared, the plaintiff should be entitled, on affidavit verifying the cause of action and swearing that in his belief there is no defence, to take out a summons to show cause why he should not be at liberty to sign judgment, upon which summons such order may be made as the justice of the case may require" (as to which see Order XIV.)

It was held by Mr. Justice Lush, at chambers,|| that the following is a special indorsement under the present Rule:—"The plaintiff's claim is £36. 5s., for balance of account for goods sold." He grounded this decision on the form of special indorsement, "for balance of account for butcher's meat," contained in Appendix (A), Part II., section 7. "It could not be intended," said his lordship, "that a list of items extending, perhaps, over three or four years, should be endorsed on the writ."

Mr. Justice Quain, in the case of *Butterworth v. Tee and Wife*, at chambers, expressed a doubt as to whether the present Rule had any application to an action in which it was sought to charge the wife's separate estate, on a guarantee for the price of goods sold, given by her in respect of her separate estate.¶

* 1 Charley's Cases (Chambers), 45, 46.

† *Ib.*, 51, 55.

§ P. 11.

|| *Ib.*, 44.

+ *Ib.*, 49.

¶ *Ib.*, 50.

A merely formal difference (such as the misplacing of a date) between the indorsement on a writ and the form of indorsement given in App. (A), Part II., section 7, will not deprive the plaintiff of the benefits conferred upon him by Order XIV. of these Rules, *infra*.*

Order III,
Rule 6.

As to the privileges enjoyed by a defendant, where the plaintiff has specially indorsed his writ, of removing the action from a District Registry, see Order XXXV., Rule 11, of these Rules, *infra*.

Where the plaintiff claims a liquidated sum in money, he ought, as a rule, to indorse the particulars on the writ of summons, so as to avoid the expense of separate particulars.†

At first it was thought by some eminent Judges, that special indorsements had done away with the need for separate particulars altogether where there was a debt or liquidated demand in money. This was the view expressed on two occasions‡ (November 2nd and December 2nd, 1876) by the late Mr. Justice Quain. It may be said in support of this view, that particulars are nowhere mentioned in the Supreme Court of Judicature Acts, except in connection with, and as included in, special indorsements.§ It is to be observed, on the other hand, that the words at the end of the 25th section of the Common Law Procedure Act, 1852, "the indorsement shall be considered as particulars of demand, and no further or other particulars of demand need be delivered unless ordered by the Court or a Judge," are omitted from the present Rule. The question was finally set at rest by the late Mr. Justice Archibald, on January 29th, 1876, who decided that the power to order particulars has not been abolished. Although notice that a statement of claim would be required had been given to the plaintiff, and a statement of claim, containing full particulars, was ready for delivery, Mr. Justice Archibald ordered particulars to be delivered, in an action for money lent, before delivery of the statement of claim. "I can see," said his lordship, "great convenience in allowing particulars before the statement of claim, as the defendant may withdraw, and costs may be saved."||

Mr. Justice Lush ordered particulars of the defendant's counterclaim of damages for breach of contract, in an action for goods sold and delivered, although it was alleged by the defendants that the counterclaim itself contained sufficient particulars.¶

Rule 7.

Wherever the plaintiff's claim is for a debt or liquidated demand only, the endorsement, besides stating the nature of the claim, SHALL state the amount claimed for debt, or in respect of such demand, and for costs respectively, and shall further state, that upon payment thereof

* 1 Charley's Cases (Chambers), 20; per Archibald, J., reversing the Master's decision.

† *Ib.*, 35; per Lush, J.

‡ *Ib.*, 35 and 36.

§ Particulars are only mentioned twice, *i.e.*, in the present Rule and in App. (A), Part II., section 7, which contains specimens of forms of special indorsements under this Rule.

|| *Barker v. Wood*, 2 Charley's Cases (Chambers), 15.

¶ 1 Charley's Cases (Chambers), 36, 75.

**Order III.,
Rule 7.**

within four days after service, or, in case of a writ not for service within the jurisdiction, within the time allowed for appearance, further proceedings will be stayed. Such statement may be in the Form in Appendix (A) hereto, Part II., section III. The defendant may, notwithstanding such payment, have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's solicitor shall pay the costs of taxation.

This Rule, which is compulsory, is taken from s. 8 of the Common Law Procedure Act, 1852, where the form also is given.

Although the nature of the plaintiff's claim is, by Rule 1, to be indorsed upon the writ in all cases, whether it be for a debt or liquidated demand or for damages, yet the old practice with respect to a stay of proceedings upon payment within four days is preserved, in the case of a claim for a debt or liquidated demand only. The check upon overcharging under the old practice has also been preserved.

Although this Rule speaks of a "debt or liquidated demand," the same phrase as used in the preceding Rule, it has of course no reference to "special" indorsements, further than this, that all specially indorsed writs must contain the statements prescribed by this Rule *in addition to* the special indorsement, under Rule 6, of "the particulars of the amount sought to be recovered." The indorsement under this Rule is not necessary where the plaintiff claims damages or damages and debt.*

Rule 8.

In all cases of ordinary account, as, for instance, in the case of a partnership or executorship or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be indorsed with a claim that such account be taken.

This Rule is a re-enactment of the first part of Rule 8 of the Principal Act.

See Order XV., *infra*, as to making an order for the account claimed in default of appearance to a summons indorsed under this Rule.

This Rule is copied almost *verbatim* from the First Report of the Judicature Commission † :—

"In like manner, in cases of ordinary account, or in the case of a partnership or executorship or ordinary trust account, when nothing more is required in the first instance than an account, the writ should be specially endorsed."

* *Perry v. Patchett*, 2 Dowl., 667. See also *Jacquot v. Bourra*, 5 W. & W., 156, and Day's Common Law Procedure Acts, p. 35, as to the indorsement required by Rule 7.

† Page 11.

ORDER IV.

Order IV.,
Rule 1.

INDORSEMENT OF ADDRESS.

Rule 1.

The solicitor of a plaintiff suing by a solicitor shall indorse upon every writ of summons and notice in lieu of service of a writ of summons the address of the plaintiff, and also, his own name or firm or place of business, and also, if his place of business shall be more than three miles from Temple Bar, another proper place, to be called his "address for service," which shall not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings and written communications may be left for him. And where any such solicitor is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor.

It is somewhat singular that Temple Bar should have been selected as the centre, that edifice being doomed to removal or destruction. Its proximity to the Masters' and the Record and Writ Clerk's Offices and to the New Law Courts, is probably the reason for the selection.

Compare with this Rule section 6 of the Common Law Procedure Act, 1852, for the earlier part of which it is, *pro tanto*, substituted.—"Every writ of summons shall be indorsed with the name and place of abode of the attorney actually suing out the same, and in case such attorney shall not be an attorney of the Court in which the same is sued out, then also with the name and place of abode of the attorney of such Court in whose name such writ shall be taken out; and when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the writ."

One of the effects of the consolidation of the Superior Courts of Common Law and Equity into one Supreme Court is the admission of attorneys and solicitors to be solicitors of the Supreme Court, in lieu of being admitted attorneys or solicitors of any one or more of the Superior Courts. Therefore the contingency contemplated in section 6 of the Common Law Procedure Act, 1852, of "the attorney actually suing out the writ" not being "an attorney of the Court in which it is sued out" cannot arise. No provision, therefore, is made in this Rule for any such contingency.

It was decided in *Engleheart v. Eyre** that where the writ is sued out by a firm of attorneys the name of the firm should be indorsed. The present Rule provides expressly for the indorsement of the name of the firm (if

* 2 Dowl., 145; *Hartley v. Rodenhurst*, 4 Dowl., 748.

Order IV.,
Rule 1.

any), both of the solicitor suing out the writ, and also of the solicitor (any) for whom he is agent.

It is also provided that "*the solicitor suing out the writ shall indorse it the address of the plaintiff.*" This is new, and a decided improvement, a defendant being entitled to full information as to the person to whom he may address himself for a settlement of the action against him.* A reference to the form of writ given in Schedule (A) to the Common Law Procedure Act, No. 1, will show that no space is left for the address of the plaintiff where the plaintiff appears by attorney. In the form given in Appendix (A) Part I., No. 1, the words "who resides at" are inserted after the word "plaintiff" when the plaintiff appears by attorney, and a blank is left for the plaintiff's address after the word "at."

It will be seen that the solicitor is to indorse his own "place of business" on his writ. This is an improvement on "place of abode," which might mean his private residence.†

The provisions respecting an "address for service" are founded on Reg. Gen., Hil. T. 1853, Rule 165, but it is a new provision that the address for service shall be indorsed upon the writ. It was formerly written in a book kept at the Master's office, but the copy of the writ filed there in the future will contain it.

It will be perceived that nothing is said about the address of the defendant. It is apprehended that the provisions of Section 2 of the Common Law Procedure Act, 1852, still apply. A reference to the form in Appendix (A), Part I., No. 1, will show that the same words as occur in the form given in Schedule (A) to the Common Law Procedure Act, 1854, No. 1, are used, in respect of the defendant's address:—

"To C.D. of () in the county of ()."

It is provided by Order XVI. of these Rules, Rule 9, that "where there are numerous parties having the same interest in one action, one or more of such parties may sue on behalf of all parties concerned. In the case of *Leathley v. MacAndrew & Company*, the plaintiff sued "*on behalf of himself and all others the underwriters of the steamship or vessel 'Cid,' at the time of the loss in the year 1873.*" Mr. Baron Huddleston reversed at chambers the decision of the Master that the plaintiff should give the names and addresses of the persons on whose behalf he was suing. "There is only *one* plaintiff," said his lordship, "in this case, and his [name and] address [have] been given; the other persons mentioned in the title are not plaintiffs."‡

Rule 2.

A plaintiff suing in person shall indorse upon every writ of summons and notice in lieu of service of a writ of summons his place of residence and occupation, and also, if his place of residence shall be more than three miles from Temple Bar, another proper place, to be called his

* Day's Common Law Procedure Acts, 4th edit. (1872), pp. 32, 33.

† See the decisions as to the meaning of the words "place of abode," "residence," and "dwelling," collected in *Attenborough v. Thompson*, 2 H. and N., 559, and in *Kerr v. Haynes*, 29 L. J. (C. B.), 44.

‡ 1 Charley's Cases (Chambers), 58.

“address for service,” which shall not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him.

Order IV.,
Rule 2.

[The above two rules are to apply to all cases in which the writ of summons is issued out of the London office, or out of a District Registry where the defendant has the option of entering an appearance either in the District Registry or the London office.]*

Compare with this Rule s. 6 of the Common Law Procedure Act, 1852, for the latter part of which it is, *pro tanto*, substituted:—“In case no attorney shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff in person, mentioning the city, town, parish, and also the name of the hamlet, street, and number of the house of such plaintiff’s residence, if any such there be.”

“His place of residence.” A reference to the Form No. 1 in Appendix (A) Part I, will show that the “city, town, or parish, and also the name of the street, and number of the house of the plaintiff’s residence (if any)” must be specifically mentioned.

The provision respecting an “address for service” is founded on Reg. Gen., Hil. T., 1853, Rule 166, but it is a new provision that the “address for service” shall be indorsed on the writ. Formerly it was written in a book kept at the Master’s office. (See the note to Rule 1.)

As to the words in italics, see the note to the next Rule.

Rule 2a.

Notwithstanding anything to the contrary contained in Order IV. of “The Rules of the Supreme Court,” Rules 1 and 2 of such Order shall only apply where the writ of summons is issued out of the London Office.

This is a new Rule added by Rule 2 of the Rules of the Supreme Court, February, 1876. This Rule repeals, also, by implication, the latter part of the direction in italics appended to Rules 1 and 2 of this Order, *supra*. Minute provisions for the indorsement of addresses on writs issued out of District Registries will be found in Rule 3a of this Order, *infra*.

Rule 3.

In all other cases where a writ of summons is issued out of a District Registry, it shall be sufficient for the solicitor to give on the writ the address of the plaintiff and his own name or firm and his place of business within the district, or for the plaintiff, if he sues in person, to give on the writ his place of residence and occupation, and if his place of residence be not within the district, an address for service within the district.

* This refers to cases where the defendant neither resides nor carries on business within the district. Order V., Rule 2, *infra*.

**Order IV.,
Rule 3.**

This Rule is annulled by the Rules of the Supreme Court, February, 1876, Rule 3.

As to District Registries, see sections 60-66 of the Principal Act, *supra*, and Orders XII. and XXXV. of these Rules, *infra*.

Rule 3a.

Order IV., Rule 3, is hereby annulled, and the following shall stand in lieu thereof:—

In all cases where a writ of summons is issued out of a District Registry, the solicitor shall give on the writ the address of the plaintiff, and his own name or firm and his place of business, which shall, if his place of business be within the district of the Registry, be an “address for service,” and if such place be not within the district, he shall add an “address for service” within the district, and where the defendant does not reside within the district, he shall add a further “address for service,” which shall not be more than three miles from Temple Bar; and where the solicitor issuing the writ is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor. Where the plaintiff sues in person, he shall give on the writ his place of residence and occupation, which shall, if his place of residence be within the district, be an “address for service,” and if such place be not within the district, he shall add an “address for service” within the district, and, where the defendant does not reside within the district, he shall add a further “address for service,” which shall not be more than three miles from Temple Bar.

This is a new Rule added by Rule 3 of the Rules of the Supreme Court, February, 1876.

This Rule is partly copied from Rules 1, 2 and 3 of this Order and partly new. The requirement of an “address for service” within the district where the plaintiff’s solicitor’s place of business is “not within the district,” is new.

The necessity for “an address for service,” within three miles of Temple Bar, depended previously on the “place of business” of the solicitor or “place of residence” of the plaintiff being more than three miles from Temple Bar, as well as upon the defendant neither residing

nor carrying on business within the district. See Rules 1 and 2 of this Order, and the italicised note thereto. It will be seen that the present Rule provides for the indorsement of *two* "addresses for service," where the defendant resides out of the district. The idea of *two* "addresses for service" is new.*

Order IV.,
Rule 3a.

ORDER V.

ISSUE OF WRITS OF SUMMONSES.

1. *Place of Issue.*

Rule 1.

In any action other than a Probate action, the plaintiff, wherever resident, may issue a writ of summons out of the Registry of any district.

As to District Registries see ss. 60-66 of the Principal Act, *supra*, and Order IV., Rule 3a, *supra*, and Order XII., Order XXXV., and Order LXI., Rule 4a, *infra*.

As to the removal of the action by the defendant, as of right, see Order XXXV., Rules 11-14.

"Other than a Probate action." On the principle, "*expressio unius est exclusio alterius*," these words were successfully relied upon in the case of *Oger v. Bradnum*,† as shewing that a writ of summons might be issued out of a District Registry in an action under the Summary Procedure on Bills of Exchange Act, 1855.‡

"May issue out of the Registry of any district." As by s. 21 of this Act "all methods of procedure" in force at the commencement of the Act, and which are not inconsistent with it, "may continue to be used and practised," the issuing of writs of summons in London is, of course, preserved. The issuing of writs out of a District Registry being, on the other hand, new, it was necessary expressly to empower plaintiffs to have recourse to this new "method of procedure."

The present Rule should be read with s. 64 of the Principal Act, *supra*. The duty is cast upon District Registrars by these two enactments of issuing writs, "when thereunto required" by "any plaintiff, wherever resident."

Rule 2.

In all cases where a defendant neither resides nor carries on business within the district out of the Registry whereof a writ of summons is issued, there shall be a state-

* In view of this new Rule, space should be left on the back of the writ, *where the defendant resides out of the district*, for "the address for service" within the district, and the "address for service" in London.

† 1 C. P. D., 344; 45 L. J. (C.P.), 273; 34 L. T., 578; 24 W. R., 404; 2 Charley's Cases (Court), 132.

‡ 18 and 19 Vict. c. 67. See the note to Order II., Rule 6, *supra*.

Order V.,
Rule 2.

ment on the face of the writ of summons* that such defendant may cause an appearance to be entered at his option either at the District Registry or the London office, or a statement to the like effect.

This Rule must be read in connection with Order XII., Rule 3, *infra*: —“If any defendant neither resides nor carries on business in the district he may appear either in the District Registry or in London.”

In the case of *Oger v. Bradnum*† a summons was taken out at chambers calling on the plaintiff to shew cause why the writ of summons should not be set aside, because, although issued out of the District Registry at Manchester, it had not on the face of it any notice pursuant to this Rule. The Common Pleas Division held that it was unnecessary to put such a notice on the face of the writ of summons in that action, because it was an action under the Summary Procedure on Bills of Exchange Act, 1855.‡ By the combined effect of that Act § and the Supreme Court of Judicature Acts|| leave to appear must be obtained from the District Registrar,¶ where the writ of summons is issued out of a District Registry. “The form,” said Mr. Justice Lindley, “in no way could mislead the defendant, as it tells him that he must get leave to appear, if he would prevent judgment against him, and that the District Registry is the proper place for him to apply for such leave.” “As the notice,” said Mr. Justice Archibald, “is that he cannot appear at all without leave, it would be idle to add, ‘If leave is given, you may appear either in the District Registry or in London.’”

Rule 3.

In all cases where a defendant resides or carries on business within the district, and a writ of summons is issued out of the District Registry, there shall be a statement on the face of the writ of summons** that the defendant do cause an appearance to be entered at the District Registry, or to the like effect.

* The following form of notice is in use: “The defendant may appear hereto by entering an appearance, either personally or by his solicitor, either at the District Registry Office of the High Court of Justice situate at _____, in the County of _____, or at the office of the Division of the said High Court of Justice at _____.”

† 1 C. P. D., 344; 45 L. J. (C. P.), 273; 34 L. T., 578; 24 W. R., 404; 2 Charley’s Cases (Court), 132.

‡ 18 and 19 Vict. c. 67. § S. 1. || Order II., Rule 6, *supra*.

¶ The defendant, however, might have applied at chambers in London for leave to appear there, per Brett, J. Order XXXV., Rule 1. See also *Lewis v. Kent*, L. T., vol. 63, p. 61.

** The following form of notice is in use: “A defendant may appear hereto by entering an appearance, either personally or by solicitor, at the District Registry Office of the High Court of Justice, situate at _____.”

This Rule must be read in connection with Order XII. of these Rules, Rule 2, *infra* :—“ If any defendant to a writ issued in a District Registry resides or carries on business *within* the District, he shall appear in the District Registry.”

Order V.,
Rule 3.

This does not preclude the defendant from removing the action, as of right, after appearance, under Rule 11 of the XXXVth Order.

2. Option to choose Division in certain cases.

Rule 4.

Subject to the power of transfer, every person by whom any cause or matter may be commenced in the High Court of Justice, which would have been within the non-exclusive cognisance of the High Court of Admiralty if the said Act had not passed, shall assign such cause or matter to any one of the Divisions of the said High Court, including the Probate, Divorce, and Admiralty Division, as he may think fit, by marking the document by which the same is commenced with the name of the Division, and giving notice thereof to the proper officer of the Court.

If so marked for the Chancery Division, the same shall be assigned to one of the Judges of such Division by marking the same with the name of such of the said Judges as the plaintiff or petitioner (subject to such power of transfer) may think fit.

“ The power of transfer.” See section 36 of the Principal Act, *supra*, and Order LI., Rules 1 and 2, *infra*. Section 34 of the Principal Act disabled plaintiffs from bringing any actions in the Probate, Divorce, and Admiralty Division, except such as were within its *exclusive* cognisance. This was cured by section 11, subsection (3), which provided, that, “ subject to Rules of Court, a person commencing any cause or matter shall not assign the same to the Probate, Divorce, and Admiralty Division unless he would have been entitled to commence the same in the Court of Probate or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, if this Act had not passed.”

“ Which would have been within the non-exclusive cognisance ” is, it is apprehended, a crabbed phrase for “ which would not have been within the exclusive cognisance.”

Causes common to the High Court of Admiralty and other Courts, *i.e.*, within the *non-exclusive* jurisdiction of the Court of Admiralty, may, by this Rule, be assigned to any one of the Divisions of the High Court.

See Rule 9 of the present Order, as to the manner in which notice to the “ proper officer ” of the Court is to be given.

“ Name of the Judge.” See the Forms 2, 3, and 4 in Appendix (C) to this Act, *infra*. It will be seen that a space is left for the name of the Judge. See also sections 33 and 42 of the Principal Act, *supra*.

Order V.,
Rule 4.

The Master of the Rolls transferred the case of *Humphreys v. Edwards** to the Probate, Divorce, and Admiralty Division, as being an ordinary action of salvage, and therefore a "cause" which would have been "within the *exclusive* cognisance" of the High Court of Admiralty.

The concluding words of this Rule are substantially repealed by Rule 4a, *infra*.

Rule 4a.

Subject to the power of transfer, and SUBJECT, ALSO, TO THE POWER OF THE LORD CHANCELLOR, BY ORDER, FROM TIME TO TIME OTHERWISE TO DIRECT, every cause or matter which shall be commenced in the Chancery Division of the High Court shall be assigned to one of the Judges thereof by marking the same with the name of such of the same Judges as the plaintiff or petitioner may in his option think fit.

This new Rule was added by the Rules of the Supreme Court, June 1877. On the 19th of June, 1877, the day on which those Rules came in force, the Lord Chancellor issued an order under this new Rule that "no cause or matter shall, until further order, be assigned to Mr. Justice Fry by the same being marked by the plaintiff or petitioner with his name." (See, also, the new Rule 1a of Order LI.)

3. Generally.

Rule 5.

Writs of summons shall be prepared by the plaintiff or his solicitor, and shall be written or printed, or partly written and partly printed, on paper of the same description as hereby directed in the case of proceedings directed to be printed.

"The writ," observes Mr. Day,† "is *issued* by the Court, but it is *prepared* by the plaintiff or his attorney."

"Written." See Order XIX. of these Rules, Rule 5, and Rule 5a (Rules of the Supreme Court, June, 1876, Rule 9), *infra*.

"Printed," i.e., "in pica type leaded." Order LVI., Rule 2, *infra*.

"Paper of the same description," i.e. "cream wove machine drawing foolscap folio paper, 19 lbs. per mill ream, or thereabouts." Order LVI., Rule 2. This involves the abolition of parchment writs. The practice is borrowed from the Court of Chancery. By the Chancery Amendment

* 45 L. J. (Ch.), 112; W. N., 1875, p. 208; 1 Charley's Cases (Court), 81.

† Common Law Procedure Acts, p. 31, 4th edit. (1872).

Act, 1852, it was provided, that "the practice of engrossing on parchment Bills of Complaint or Claims to be filed in the Court, or of filing such engrossment, shall be discontinued; and the Clerks of Records and Writs of the said Court shall receive and file a printed Bill of Complaint or Claim, in lieu of an engrossment thereof, in like manner as they now receive and file such engrossment."

Order V.,
Rule 5.

Rule 6.

Every writ of summons shall be sealed by the proper officer, and shall thereupon be deemed to be issued.

"The indorsements," says Mr. Day,* when stating the old Common Law practice, "being made on the writ, it must be sealed at the office of the Court from which it is issued." See, also, s. 61 of the Principal Act, *supra*, and 8 and 9 Vict. c. 113.

As to the "proper officer," see Order LXIII. of these Rules, *infra*.

Rule 7.

The plaintiff or his solicitor shall, on presenting any writ of summons for sealing, leave with the officer a copy, written or printed, or partly written and partly printed, on paper of the description aforesaid, of such writ, and all the indorsements thereon, and such copy shall be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person.

"Written." "Printed." "Paper of the description aforesaid." See the note to Rule 5 of this Order, *supra*, and the references there given.

"All the indorsements thereon." See Orders II., III., and IV., *supra*, and Appendix (A.) Part II., *infra*.

No mention is made of a *præcipe* in this or the following Rules. By Order XLII., Rule 10, it is provided that "No writ of execution shall be issued without a *præcipe*." The *præcipe* was left with the officer,† who filed it and entered full particulars of it in a book kept for the purpose.‡ Instead of the *præcipe*, the plaintiff, or his solicitor, is to leave a copy of the writ, which is to be filed.§ (See the next section.)

The filing of a copy of a writ, and of "all the indorsements thereon," seems to be borrowed from the practice of the Court of Chancery of filing a copy of the Bill.¶ It was provided by Order VIII, Rule 1, of the Consolidated Orders of the Court of Chancery that no Bill should be filed unless it was signed by Counsel. A Bill did not require to be signed by the plaintiff or his attorney.¶ It will be seen from the form of *præcipe*** that

* Common Law Procedure Acts, p. 31, 4th edit. (1872.)

† See Archbold's Practice, p. 198.

‡ Archbold's Forms, p. 42, n. (a.)

§ See Archbold, *ubi supra*.

¶ See 15 & 16 Vict. c. 86, ss. 1, 4: Order VIII, Rule 3, and Order IX, Rule 4, of the Consolidated Orders of the Court of Chancery.

¶ Ayckbourn's Chancery Practice, p. 12.

** Archbold's Practice, p. 42.

Order V.,
Rule 7.

it was signed by the plaintiff's attorney or by the plaintiff himself, if sued in person. The present Rules provide that the copy of the writ in lieu of the *præcipe*, shall be similarly signed.

Rule 8.

The officer receiving such copy shall file the same and an entry of the filing thereof shall be made in a book to be called "The Cause Book," which is to be kept in the manner in which Cause Books have heretofore been kept by the Clerks of Records and Writs in the Court of Chancery, and the action shall be distinguished by the date of the year, a letter, and a number, in the manner in which causes are now distinguished in such last-mentioned Cause Books.

See the Consolidated General Orders of the Court of Chancery, Order I., Rules 47, 48, 49 and 50.

The present Rule effects a considerable change in the practice of the Superior Courts of Common Law. Prior to the 1st of November, 1875, the commencement of the action was noted up in one book in the defendant's name, and the appearance to the action in another, also in the defendant's name, in the simplest possible form. To the greater number of actions no appearance was entered at all, the mere serving of the writ being sufficient to bring the defendant to terms. Out of 17,348 actions in the Court of Common Pleas in 1874, appearances were entered only in 6,041. The "writ book" contained nothing but the names of the defendant, and of the plaintiff and his attorney. The appearance book contained only the names of the defendant, of the plaintiff and of the defendant's attorney. The Common Law officers now incorporate the appearance in the same book in which the commencement of the action is recorded.

The Clerks of Records and Writs in Chancery perform all such duties as were formerly performed by the six clerks, sworn clerks, and writing clerks, as officers of the Court of Chancery.* Amongst their duties was the filing of all Bills, answers, and other pleadings, and the filing of appearances.†

All suits and proceedings in Chancery are divided amongst the Clerks of Records and Writs according to the letters of the plaintiff or first plaintiff's surname, and all subsequent proceedings, bills of review or supplement, for example, are filed under the same name, although the plaintiff's or first plaintiff's surname in the subsequent proceedings may not be the same as in the original suit.†

* Consolidated General Orders of the Court of Chancery, Order I. (VI.), 55

† *Ibid.*

‡ Veal's Practice, 6.

The Chancery Cause Book assumes an important position in the new practice. It supersedes the Common Law "Writ Book," and "Appearance Book," and to some extent, the "Judgment Book," also. The form of the "Cause Book" was as follows at the commencement of the Supreme Court of Judicature Acts:—

| Names, &c., of Plaintiff's Solicitors. | Parties' Names. | Appearances and Defendants' Solicitor's Names. | Interrogatories, Answers, Exceptions, Replications and Depositions.* | | Folios. | Memo- randa of Service. | Consents, and Record and Writ Clerk's Certificate. | Orders and Decrees. | | | Reports and Certificates. | |
|--|--------------------|--|---|--------------------|---------|----------------------------------|---|-----------------------------|-------|---|------------------------------|-------|
| | | | Nature of docu- ment. | Date of filing. | | | | Nature of docu- ment. | Date. | Reference to Regis- trar's Book. | Nature of docu- ment. | Date. |
| | | | | | | | | | | | | |

* The italicised headings are no longer in use.

The Chancery Cause Book is now kept in the following amended form:—

[illegible]

Record and Writ Clerks keep books in the nature of Indices to the various causes. The following is the form of entry :—

| Reference to Cause. | Name of Cause. | Name of Judge. |
|---------------------|-----------------|----------------|
| 13. O. 41. | Jones v. Smith. | V. C. Malins. |

Each entry is under the name of the *plaintiff* (or first plaintiff) in alphabetical order. The entries are, at first, made in paper books; but, at the end of three weeks the entries are transferred to very durable books of parchment. The method of "filing" the pleadings in the Record and Writ Clerks' office is very simple. The various documents are laid, in chronological order, one upon the top of the other. Formerly the documents were "dressed," i.e., strung upon a hook passed through the ends of the parchment; but this was, of course, discontinued, when parchment ceased to be used. The little pile of documents in each cause is secured by a leather strap fastened with a buckle, which is easily undone when an inspection of any document becomes necessary. The little piles thus secured are placed carefully away in their appropriate pigeon holes.* In the Queen's Bench and Exchequer Divisions the Cause Book is confined to the entry of writs and appearances, which are, *also*, however, in separate books, under the old system, in the Queen's Bench. In the Exchequer Division of the Cause Book is kept thus :—

| Date of writ. | Plaintiff. | Plaintiff's Solicitor. | Defendant. | Defendant's Solicitor. | Date of Appearance. |
|---------------|------------|------------------------|------------|------------------------|---------------------|
|---------------|------------|------------------------|------------|------------------------|---------------------|

The Queen's Bench Cause Book is, so far, identical, but contains the following particulars :—

The Chancery Cause Book is now kept in the following amended form:—

| Names of Plaintiff's Solicitors. | Parties' Names. | Appearances and Defendants' Solicitor's Names. | Writs. | Pleadings. | Memoranda of Service. | Orders and Judgments. | | | Certificates. | |
|--|--------------------|--|--------|------------|-----------------------------|-----------------------|-------|-----------|---------------|-------|
| | | | | | | | Date. | Reg. Lib. | | Date. |
| | | | | | | | | | | |

It will be seen that this form is simpler than the former one.

The "Cause Book" is thus an exhaustive summary of the proceedings in the cause from beginning to end, with this qualification, that the decree or order pronounced in the cause is not set out at length or even attempted to be summarised. The date only of the decree or order is inserted, supplemented by a reference to the Registrars' Books. The Registrars' Books are filled up at the Registrars' Office and sent over, as soon as filled up, to the Record and Writ Clerks' Office to be kept there.

Order V.,
Rule 8.

The Record and Writ Clerks keep books in the nature of Indices to the Chancery causes. The following is the form of entry :—

| Reference to Cause. | Name of Cause. | Name of Judge. |
|---------------------|-----------------|----------------|
| 1873. O. 41. | Jones v. Smith. | V. C. Malins. |

The entry is under the name of the *plaintiff* (or first plaintiff) in alphabetical order. The entries are, at first, made in paper books; but, at the end of three weeks the entries are transferred to very durable volumes of parchment.

The method of "filing" the pleadings in the Record and Writ Clerks' Office is very simple. The various documents are laid, in chronological order, one upon the top of the other. Formerly the documents were "hooked," i.e., strung upon a hook passed through the ends of the parchment, but this was, of course, discontinued, when parchment ceased to be employed. The little pile of documents in each cause is secured by a leathern strap fastened with a buckle, which is easily undone when an examination of any document becomes necessary. The little piles thus strapped are placed carefully away in their appropriate pigeon holes.*

In the Queen's Bench and Exchequer Divisions the Cause Book is confined to the entry of writs and appearances, which are, *also*, however, entered in separate books, under the old system, in the Queen's Bench. In the Exchequer Division of the Cause Book is kept thus :—

| 187- No. | Date of Writ. | Plaintiff. | Plaintiff's Solicitor. | Defendant. | Defendant's Solicitor. | Date of Appearance. |
|-------------|---------------------|------------|---------------------------|------------|---------------------------|------------------------|
|-------------|---------------------|------------|---------------------------|------------|---------------------------|------------------------|

The Queen's Bench Cause Book is, so far, identical, but contains *additional* particulars, as follows :—

| Defendant appears as | Solicitors. | | Date of Appearance. |
|-------------------------|-------------|----------|------------------------|
| | Date. | To whom. | |

* The writer is indebted to Mr. Ward, the Record and Writ Clerk, for an opportunity of inspecting the method of filing proceedings and keeping Cause-Books in the Chancery Division; and to Mr. Hodgson, Chief Clerk to the Masters of the Common Pleas Division, for the form of the Common Pleas Cause-Book.

Order V.,
Rule 8.

In the Common Pleas Office the following form has been adopted for the new "Cause Book," kept under the present Rule:—

| Names, &c. of Plaintiff's Solicitors. Date and Number. | Parties. | Nature of Claim. | Appearances of Defendant's Solicitor's Name. | Filings, Plead- ings, &c. | Date of Judg- ment. | Nature of Judgment. | | | | | Debt or Damages. | Costs. | |
|--|----------|---------------------|---|---------------------------------|---------------------------|-------------------------|---------|-------------------------------------|--------------------------------------|--|---------------------|--------|-----------------|
| | | | | | | Final, by default of | | Inter- locy, by default of | Under Order XIV. i. Rule i. | Other Judg- ments or Orders. | | | After Trial. |
| | | | | | | Appoe. | Defcoe. | | | | | | |
| | | | | | | | | | | | | | |
| | | | | | | | | | | | | | |

In the Queen's Bench and Exchequer Divisions judgments are entered in a separate Book. (See notes to Order XL.)

Rule 8a.

Order V.,
Rule 8a.

The following words are hereby added to the end of Order V., Rule 8, of the Rules of the Supreme Court:—

And when such action shall be commenced in a District Registry, it shall be further distinguished by the name of such Registry.*

This is a new Rule added by the 3rd Rule of the Rules of the Supreme Court, June, 1876.

Rule 9.

Notice to the proper officer of the assignment of an action to any Division of the Court under section 11 of the Supreme Court of Judicature Act, 1875, or under Rule 4 of this Order, shall be sufficiently given by leaving with him the copy of the writ of summons.

By section 11 of this Act, "subject to any Rules of Court, and to the provisions of the Principal Act and this Act, and to the power of transfer, every person by whom any cause whatever may be commenced in the High Court of Justice, shall assign such cause or matter to one of the Divisions of the said High Court, as he may think fit, by marking the document by which the same is commenced with the name of such Division and giving notice thereof to the proper officer of the Court."

"The proper officer" is defined by Order LXIII. of those Rules (Interpretation Clause), *infra*.

See also Rule 4 of this Order, *supra*, as to notice to the "proper officer" of the assignment to any Division of causes "within the non-exclusive cognisance of the High Court of Admiralty."

4. *In particular Actions.*

Rule 10.

The issue of a writ of summons in Probate actions shall be preceded by the filing of an affidavit made by the plaintiff or one of the plaintiffs in verification of the indorsement on the writ.

The writ is now substituted for the "citation," Order I., Rule 1. It cannot issue from a District Registry, Order V., Rule 1.

* The name of the District Registry is now placed after that of the Division of the High Court, to which the action belongs, thus:—

" High Court of Justice :

" Division :

" District Registry.'

**Order 9.,
Rule 10**

“Probate Actions” include “actions and other matters relating to the grant or recall of probate or of letters of administration other than common form business.”*

The present Rule is founded on Rule 68 of the Rules of 1862 of the Court of Probate:—“No citation is to issue under seal of the Court, until an affidavit in verification of the averments it contains has been filed in the Registry.”† This is called “an affidavit to lead the citation.”

Rule 11.

In Admiralty actions in rem no writ of summons shall issue until an affidavit by the plaintiff or his agent has been filed, and the following provisions complied with:

(a) The affidavit shall state the name and description of the party on whose behalf the action is instituted, the nature of the claim, the name and nature of the property to be arrested, and that the claim has not been satisfied.

(b) In an action of wages the affidavit shall state the national character of the vessel proceeded against; and if against a foreign vessel, that notice of the institution of the action has been given to the Consul of the State to which the vessel belongs, if there be one resident in London [*a copy of the notice shall be annexed to the affidavit.*]

(c) In an action of bottomry the bottomry bond, and if in a foreign language also a notarial translation thereof, shall be produced for the inspection and perusal of the Registrar, and a copy of the bond, or of the translation thereof, certified to be correct, shall be annexed to the affidavit.

(d) In an action of distribution of salvage the affidavit shall state the amount of salvage money awarded or agreed to be accepted, and the name, address, and description of the party holding the same.

(e) The Court or Judge may in any case, if he think fit, allow the writ of summons to issue although

* Order LXIII. (Interpretation Clause), *infra*.

† See *In the Goods of Chamberlain*, 36 L. J. (P. and M.), 53.

the affidavit may not contain all the required particulars. In a wages cause he may also waive the service of the notice, and in a cause of bottomry the production of the bond.

Order V.,
Rule 11.

The introductory words of this Rule are annulled. For the words substituted for them, see Rule 11b of this Order, *infra*.

Subsection (a) is copied from Rule 9 of the Rules of the High Court of Admiralty, made in pursuance of the 3 and 4 Vict. cc. 65 and 66, and 17 and 18 Vict. c. 78.

Subsection (b) is copied from Rule 10 of the same Rules, which, however, applies to "a cause of necessities," as well as "a cause of wages." The words in large italics at the end of this sub-section were part of the Rule in the original Rules of Court of 1874, being connected with it by the word "and."

Subsection (c) is copied *verbatim* from Rule 11 of the Rules of the High Court of Admiralty.

As to subsection (d), see the remarks in Williams and Bruce's Admiralty Practice, p. 128 (edit. 1869).

Subsection (e) is copied from Rule 13 of the same Rules, "the Court or Judge," being substituted for "the Registrar." The Rules in the original applies to a warrant to arrest the property proceeded against; in the present rule they are made applicable to the writ of summons.

Rule 11a.

The first paragraph of Rule 11 of Order V. of the Rules of the Supreme Court is hereby annulled, and the following shall stand in lieu thereof:

In Admiralty actions in rem a warrant for the arrest of property, according to the Form (B), in the Appendix to these Rules, may be issued at the instance either of the plaintiff or of the defendant at any time after the writ of summons has issued, but no warrant of arrest shall be issued except from the Principal Registry in London, and until an affidavit by the party or his agent has been filed, and the following provisions complied with.

This new Rule, annulling the introductory words of the last Rule, was added by Rule 3 of the Rules of the Supreme Court, December, 1875. It has itself, with the form (No. 4b, *infra*), been annulled by the next Rule, which, however, re-affirms its provisions, with the omission merely of the words "except from the Principal Registry in London, and."

Rule 11b.

Rule 3 of the Rules of the Supreme Court, December, 1875, is hereby annulled, and the following Rule substituted:—

The first paragraph of Rule 11 of Order V. of the Rules

Order V.,
Rule 11b.

of the Supreme Court is hereby annulled, and the following shall stand in lieu thereof :—

In Admiralty actions *in rem* a warrant for the arrest of property according to the Form (A) in the Appendix to these Rules may be issued at the instance either of the plaintiff or of the defendant at any time after the writ of summons has issued, but no warrant of arrest shall be issued until an affidavit by the party or his agent has been filed, and the following provisions complied with.

This new Rule was added by Rule 4 of the Rules of the Supreme Court, February, 1876. The only difference between this Rule and the last Rule is the omission of the words “except from the Principal Registry in London and,” before the word, “until ;” some words are added, also, to the form (Form No. 4c, *infra*).

This Rule must be read in connection with Order II., Rules 7 and 7a, *supra*. The form of Admiralty Writ, prescribed by Order II., Rule 7, combined in one a warrant of arrest and a writ of summons; and the introductory portion of Rule 11 of the present Order originally required, therefore, that the affidavit should precede the issuing of the writ, with a view to carrying out the previous practice of the High Court of Admiralty, that an “affidavit to lead the warrant,” should precede the issuing of the warrant. The “affidavit to lead the warrant” however, though filed *before* the issuing of the warrant, was not filed till *after* the commencement of the cause *in rem* by the “*præcipe* to institute.”* Order II., Rule 7a, and the present Rule, break up the form of writ given by Order II., Rule 7, and Appendix (A), Part I., Form No. 4, into its component parts, separating the writ of summons for the commencement of the action from the warrant of arrest, and making the issuing of the writ of summons precede the warrant of arrest.† Consequently, the old practice of filing an “affidavit to lead the warrant” after the commencement of the cause *in rem*, but *before* the issuing of the warrant, is, *mutatis mutandis*, restored.

Rule 12.

If, when any property is under arrest in Admiralty, a second or subsequent action is instituted against the same property, a solicitor in such second action may, subject to the preceding rules, take out a writ of summons in rem and cause a caveat against the release of the property to be entered in the Caveat Release Book hereinafter mentioned.

Any person may commence a second or subsequent suit to enforce any claim he may have against the property proceeded against in an action *in*

* “The proctor may, on filing a *præcipe* and an affidavit, take out a warrant for the arrest.” Rule 8 of the Rules of the High Court of Admiralty, 1859.

† The citation of the parties interested, which was, formerly, a part of the warrant of arrest, now precedes it, being contained in the writ of summons.

in the Court of Admiralty. He may, until his rights can be adjudicated upon, prevent the release of the property under arrest. The present Rule has been annulled by Rule 12a, the effect of which is, should appear, to restore Rule 16 of the Rules of the High Court of Admiralty,* which is as follows:—"If, when any property is under arrest in the Court, a second or subsequent cause is instituted against the same property, it shall not be necessary to take out a second warrant for the property's arrest thereof; but the proctor in such second or subsequent cause, on filing in the Registry a *præcipe* and affidavit, take out a citation in the cause, and cause a caveat against the release of the property to be entered in the 'Caveat Release Book.'"

Rule 12a.

Order V., Rule 12, of the Rules of the Supreme Court, hereby annulled.

This new Rule was added by Rule 4 of the Rules of the Supreme Court, December, 1875.

The probable effect of it is stated under Rule 12, *supra*.

ORDER VI.

CONCURRENT WRITS.

Rule 1.

The plaintiff in any action may, at the time of or at any time during twelve months after the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear *teste* of the same day as the original writ, and to be marked with a seal bearing the word "concurrent," and the date of issuing the concurrent writ; and such seal shall be impressed upon the writ by the proper officer: Provided always, that such concurrent writ or writs shall only be in force for the period during which the original writ in such action shall be in force.

The "months" are calendar months. Order LVII., Rule 1, *infra*.

See (as to the reason for selecting "twelve months"), Order VIII., Rule 1, which extends the time during which a writ of summons shall remain in force from six months† to twelve.

* See sections 18 and 21 of this Act, and the italicised note at the head of the present Schedule, *supra*. See also and compare *The "Polymede,"* 1 P. D., 121; 34 L. T., 367; 24 W. R., 256, decided on Order XIII., Rule 10, *infra*.

† Six months was previously fixed by the C. L. Proc. Act, 1852, s. 11.

**Order VI,
Rule 1.**

This Rule is copied from section 9 of the Common Law Procedure Act, 1852, "twelve months" being substituted for six.

The form of the writ and indorsements will be the same as that of original writ and indorsements, except that the officer must be required to seal the writ with a seal "bearing the word 'concurrent' on it." A concurrent writ must now be issued within twelve months from the date of issuing of the original writ,* but it may be renewed under Order VII *infra*.

The officer, it is suggested, should make an indorsement on the copy of the original writ filed by him, of the fact of the issuing of the concurrent writ.†

In addition to the ordinary case of there being two or three defendants, concurrent writs are useful, and, indeed, often necessary, when it is not known in which of different places the defendant is likely to be met with, or when it is doubtful whether he is at home or abroad.

The Courts have no power to enable a plaintiff to issue a concurrent writ with one which has been renewed and then lost, although the application is made during the currency of the renewed writ. "We cannot," said Mr. Justice Blackburn, "issue a concurrent writ with one which does not exist."‡

Rule 2.

A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service out of the jurisdiction; and a writ for service, or whereof notice, in lieu of service, is to be given out of the jurisdiction; and a writ for service, or whereof notice, in lieu of service, is to be given out of the jurisdiction may be issued and marked as a concurrent writ with one for service within the jurisdiction.

This Rule is copied *verbatim* from section 22 of the Common Law Procedure Act, 1852, with the addition of the words, "or whereof notice, in lieu of service, is to be given," which seems to have been accidentally omitted from that section.

As to notice in lieu of service, see s. 19 of the Common Law Procedure Act, 1852, and Appendix (A), Part I., Nos. 2 and 3, *infra*.

In *Beddington v. Beddington*,§ which was a testamentary suit in the Probate Division, a writ of summons for service within the jurisdiction was issued against the next of kin of the deceased. One of the next of kin, who herself resided within the jurisdiction, was married to a French subject, resident in France, who was made a defendant to the suit. Leave was given by Sir James Hannen to the plaintiffs to issue a concurrent

* See and compare *Coles v. Sherrard*, 11 Ex., 4.

† By analogy to the indorsing of the *præcipe* for the original writ filed. See Archbold's Practice, p. 55.

‡ *Davies v. Garland*, 1 Q. B. D., 250; 45 L. J. (Q. B.), 137; 33 L. T., 727; 24 W. R., 252.

§ 45 L. J. (P. D. and A.), 44; 34 L. T., 366; 24 W. R., 348.

writ of summons for service out of the jurisdiction, and to serve notice of such concurrent writ on the foreigner, in conformity with s. 19 of the Common Law Procedure Act, 1852, and the present Rule.

**Order VI.,
Rule 2.**

ORDER VII.

DISCLOSURES BY SOLICITORS AND PLAINTIFFS.

Rule 1.

Every solicitor whose name shall be endorsed on any writ of summons shall, on demand in writing made by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith whether such writ has been issued by him or with his authority or privity; and if such solicitor shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a Judge.

This Rule is copied from s. 7 of the Common Law Procedure Act, 1852, with the usual addition of the words, "who has been served therewith, and who has appeared thereto," after the word "defendant."

The defendant, upon making an affidavit of the facts, can obtain an order from a Master to stay the proceedings.

Rule 2.

When a writ is sued out by partners* in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant, declare forthwith the names and places of residence of all the persons constituting the firm. And if the plaintiffs or their solicitors shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the Court or a Judge may direct. And when the names of the partners

* See, further, as to partners, Order III., Rule 8, *supra*; Order IX., Rule 6 and Rule 6a; Order XII., Rule 12; Order XV.; Order XVI., Rule 10a; Order XIX., Rule 11; and Order XLII., Rule 8, *infra*.

Order VII.,
Rule 2.

are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as the plaintiffs in the writ. But all proceedings shall, nevertheless, continue in the name of the firm.

By Order XVI., Rule 10, "any two or more persons claiming or liable as co-partners may sue or be sued in the name of their respective firms;" and any party to an action may in such case apply by summons to a Judge for a statement of the names of the persons who are partners in any such firm, to be furnished in such manner and verified by oath or otherwise, as the Judge may direct."

The present Rule and the latter part of Order XVI., Rule 10, appear to some extent, to overlap each other, but the distinctions between them are that (1) the present Rule enables defendants to obtain disclosure from plaintiffs or plaintiffs' solicitors; Order XVI., Rule 10, enables any party to the action to obtain disclosure from plaintiffs or defendants. (2) The present Rule confers on defendants an absolute right to demand disclosure, to be enforced by a stay of proceedings, in default of disclosure. Order XVI., Rule 10, enables any party to the action to *apply* by summons to a Judge for disclosure; of course the Judge may decline to sanction the disclosure. But disclosure of the names of partners sued in the name of their firm can only be desired for the purpose of signing judgment and issuing execution in default of appearance, as by Order XII. of these Rules, Rule 12. "where partners are *sued* in the name of their firm they must appear individually, in their own names."

ORDER VIII.

RENEWAL OF WRIT.

Rule 1.

No original writ of summons shall be in force for more than twelve months* from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to a Judge, or the District Registrar, for leave to renew the writ; and the Judge or Registrar, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date

* "Months" mean calendar months, Order LVII., Rule 1, *infra*.

of such renewal,* and so from time to time during the currency of the renewed writ. And the writ shall in such case be renewed by being marked with a seal bearing the date of the day, month, and year of such renewal; such seal to be provided and kept for that purpose at the proper office, and to be impressed upon the writ by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in Form No. 5 in Appendix (A), Part I.; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons.

Order VIII.,
Rule 1.

This Rule is founded upon s. 11 of the Common Law Procedure Act, 1852, but the provisions of that section have been considerably modified. See Order VI., Rule 1.

A writ of summons under s. 11 of the Common Law Procedure Act, 1852, was only in force for *six* months from the day of its date. This Rule says that *twelve* "months from the date thereof" shall be the maximum time during which it shall remain in force.† A check, on the other hand, is put upon the renewal of writs as of course. The ceremony of an application on affidavit (setting out that efforts have been made to serve the original writ) to a Judge, Master or District Registrar, is interposed. The application is *ex parte*.‡ Instead of the plaintiff delivering to the proper officer§ a *præcipe* in such form as was required to be delivered for obtaining an *alias* writ, he is to deliver to him a memorandum in Form No. 5, in Part I., Appendix (A), *infra*. The writ will be re-sealed with a "renewal" seal, when this "renewal" memorandum has been delivered. The renewed writ will, as heretofore, itself require renewal if the defendant is not served within six calendar months from the date of renewal.||

The "N.B." to the Forms of Writ given in Appendix (A), Part I., is defective, and requires the words, "within six calendar months," to be inserted after "renewed."

The Rule, it is said,¶ applies only to writs issued under the Supreme Court of Judicature Acts. An application was made on November 5th,

* The twelve months during which the renewed writ continues in force are to be reckoned inclusive of the day of renewal. *Anon.*, 1 H. and C., 664.

† See *Re Jones, Eyre v. Cox*, 46 L. J. (Ch.), 316. The date is that of the issue of the writ, not of its amendment.

‡ Coe's Practice of the Judges' Chambers, 45.

§ As to the "proper officer," see Order LXIII. of these Rules, *infra*.

|| See Day's Common Law Procedure Acts, p. 36.

¶ Coe's Practice of the Judges' Chambers, 47.

Order VIII., 1875, at chambers, for an order to renew a writ issued in 1874, and duly
Rule 1. renewed at intervals of six months. Mr. Justice Lush declined to make an order.*

In the case of *Davies v. Garland*† the Queen's Bench Division refused to allow the renewal of a writ of summons which had been renewed previously to the 1st of November, 1875, on the ground that, although the application was made within six months from the renewal, the original writ had, since the renewal, been lost. A verified copy of the original writ cannot be sealed with the renewal seal. The renewal seal must be impressed on the original writ itself.

"Before the expiration of the twelve months." Jessel, M. R., ordered a writ of summons to be renewed, although the twelve months had expired before he was applied to.‡

Rule 2.

The production of a writ of summons purporting to be marked with the seal of the Court, showing the same to have been renewed in manner aforesaid shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ for all purposes.

This Rule is copied *verbatim* from s. 13 of the Common Law Procedure Act, 1852. The defendant is at liberty to rebut the evidence afforded by the production of the writ, so that the words, "*prima facie*," must be considered as inserted after the word "sufficient."§

ORDER IX.

SERVICE OF WRIT.

1. *Mode of Service.*

Rule 1.

No service of writ shall be required when the defendant, by his solicitor, agrees to accept service, and enters an appearance.

This Rule is a re-enactment of Rule 4 of the Principal Act.

* 1 Charley's Cases (Chambers), 37.

† 1 Q. B. D., 250; 45 L. J. (Q.B.), 137; 33 L.T., 727; 24 W. R., 252.

‡ *Re Jones, Egge v. Cox*, 46 L. J. (Ch.), 316.

§ Day's Common Law Procedure Acts, citing *Barraclough v. Greenhough*, L. R., 2 Q. B., 612, and *Fisher v. Cox*, 16 L. T., 397, Q. B., E. T., 1867.

As a general rule, there is no equivalent for personal service, except an undertaking by a solicitor to appear.* By Reg. Gen., Hil. T., 1853, r. 3, a solicitor not entering an appearance in pursuance of his undertaking, is liable to an attachment. That rule is now Order XII., r. 14 of this Schedule. See *Jacob v. Magnay*,† *Morris v. James*.‡

The following is the form of undertaking given by Mr. Chitty, § as actually indorsed in this case on the writ of summons:—"I undertake to appear for the within-named defendant, according to the exigency of the within writ. A. A. The day of , 187 . " The form affidavit for obtaining the attachment may be framed upon those given by Mr. Chitty, Book XII. || of his "Forms."

When service is required, the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the Court or to a Judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or Judge may make such order for substituted or other service, or for the substitution of notice for service, as may seem just.

See Order X., as to the necessity for an affidavit in support of an application for an order for "substituted or other service," or "for the substitution of notice for service" under this Rule.

"The manner in which personal service is now made." The question whether personal service has been effected must, in any particular instance, depend upon its peculiar facts.¶ It is not necessary to leave the copy of the writ in the actual corporal possession of the defendant,** for, whether the process server touches him and puts it in his hand is immaterial. Personal service may be where you see a person and bring the process to his notice;†† and if, after your informing the defendant of the nature of the process, and tendering him the copy, he refuses to receive it, then placing it on his person,‡‡ or throwing it down in his presence,§§ would be sufficient service.

Substituted service was constantly permitted in the practice of the Court of Chancery, where the question of what is sufficient service arose more frequently than at Common Law, on account of the number of defendants to every suit. The principle upon which that Court acted in directing substituted service is clearly enunciated by Lord Cranworth in the case of *Hope v. Hope*.||| His lordship there

† L. J., 2 Q. B., 93 † 6 Dowl., 514.

Heath v. White, 2 D. & L., 40. ***Digby v. Thompson*, 1 Dowl., 363.

†† *Thompson v. Phency*, 1 Dowl., 441.

† *Bell v. Vincent*, 7 D. & R., 233.

See per Paterson, J., 1 Dowl., 443.

114 De G. M. & G. 328, affirming S. C., 19 Beav., 257.

**Order IX.,
Rule 2.**

observed that where there is an agent in this country managing the affairs of a defendant who is abroad, and regularly communicating upon his affairs, or where he has an agent here specially managing the particular matter involved in the suit, the Court has felt that it might safely allow service upon the agent to be deemed good service abroad, because the inference was irresistible, that service so made was service on a person either impliedly authorised to accept that particular service, or who would certainly communicate the process so served to the party who was not in this country to receive it himself. The object of all service was, of course, only to give notice to the party on whom it was made; so that he might be made aware of and able to resist that which was sought against him, and when that had been substantially done, so that the Court might feel perfectly confident that service had reached him, everything had been done that was required.

For the former practice at Common Law, see s. 17 of the Common Law Procedure Act, 1852.

There have been several decisions both at Judges' chambers and in Court on the various expressions contained in this Rule, which it will now be convenient to notice.

"If it be made to appear to the Court or a Judge." Leave for substituted service, is necessary, where personal service cannot be effected.*

"Substituted service." If a solicitor who has acted for A. B. is in the habit of calling at the club of A. B. for the letters of A. B., substituted service on the solicitor will (if A. B. cannot be found) be sufficient.†

An order was made at chambers for substituted service on the managing clerk of a defendant who was in India.‡

Substituted service upon a collector of rents of leasehold houses, who was the defendant in an action to recover possession of the houses, and who had absconded and could not be found, was directed by Vice-Chancellor Hall to be effected by leaving a copy of the writ at each of the houses, and by inserting advertisements in the *London Gazette* and *Times*. The Vice-Chancellor intimated that the ordinary eight days' interval would run from the service of the copy of the writ and the issue of the advertisements, whichever was latest in point of time.§

Mr. Justice Quain decided, at chambers, that where substituted service is ordered under the Summary Procedure on Bills of Exchange Act, 1855, the time limited for appearance runs from the time at which the order takes effect.|| This decision, in which it was taken for granted that substituted service could be effected under the Bills of Exchange Act, was not cited in the able argument of Mr. R. Henn Collins, in the case of *Pollock v. Campbell*, in which the Exchequer Division held that the plaintiff, in an action brought under the Summary Procedure on Bills of Exchange Act, 1855, cannot obtain an order for substituted service under this Rule.¶ (See Order II., Rule 6, and the note thereto, *supra*.)

* 1 Charley's Cases (Chambers), 37.

† *Ibid.*, 38.

‡ *Armitage v. Fitzwilliam*, 1 Charley's Cases (Chambers), 39.

§ *Crane v. Jullion*, 2 Ch. D., 220; 24 W. R., 691.

|| *Johnson v. Moffat*, 1 Charley's Cases (Chambers), 39.

¶ *Pollock v. Campbell*, 1 Ex. D., 50; 45 L. J. (Ex.), 199; 34 L. T., 367; 24 W. R., 320; 2 Charley's Cases (Court), 191.

An action was brought against "the Governor and Government of the Colony of New Zealand," to recover damages for the alleged breach of an emigration contract, expressed to be made between the Queen, on behalf of the Colony of New Zealand, of the first part, the Agent-General in England for the Government of the Colony, of the second part, and the plaintiffs, who were shipowners, of Hamburg, of the third part. The Divisional Court of the Common Pleas Division (Coleridge, C. J., and Archibald, J.) made an order for substituted service of the writ of summons on a London solicitor, who acted as solicitor for the Government of the Colony of New Zealand in England. The Court of Appeal rescinded the order. "There must be some person or persons or body corporate," said James, L. J., "on whom there could be original service. There is no person or persons or body corporate in England or New Zealand called the Governor and Government of New Zealand; and, therefore, there could be no original service of the writ, either in England or in New Zealand." "It is perfectly well known," said Mellish, L. J., "that, with regard to contracts entered into in the name of the Queen, there is no remedy except by petition of right."*

It is contrary to the comity of nations to allow substituted service on the ambassador of a foreign State.†

Substituted service cannot be ordered of a notice of application for a writ of attachment ‡

"Or other service." Service of a writ of summons, together with notice of motion, where the defendant appeared to be avoiding personal service, was ordered to be effected by the document being left at his dwelling-house, copies being at the same time left at his place of business, and addressed to him by post at both places.§

It will be perceived that the present Rule speaks of the "substitution of notice for service" where "the plaintiff is unable to effect prompt personal service." This does not apply to the case of a defendant resident within the jurisdiction, who has absconded and whose present address is unknown. Vice-Chancellor Hall, in such a case,|| ordered that service of the writ of summons should be effected by leaving a copy of the writ at the office where the defendant's business was, in his absence, being carried on, and at the lodgings last occupied by him before he absconded; also, by inserting advertisements in the *London Gazette* and in the *Times*. His lordship refused to make any order varying the usual eight days fixed by the writ for a defendant's appearance. The defendant did not appear. The Vice-Chancellor then ordered that service of the notice of motion for judgment should be effected in the same manner as the service of the writ of summons.¶

In the case of *Rafael v. Ongley*,** which Vice-Chancellor Hall decided a

* *Sloman v. The Governor and Government of New Zealand*, 1 C. P. D., 563; 46 L. J. (C. P.), 185; 35 L. T., 454; 25 W. R., 86.

† *Stewart v. The Bank of England*, W. N., 1876, p. 263; 11 N. C., 187, *nomine*, *Stewart v. The Sultan of Turkey*.

‡ 2 Charley's Cases (Chambers), 16.

§ *Capes v. Brewer*, 24 W. R., 40; W. N., 1875, p. 193; 1 Charley's Cases (Court), 90.

|| *Cook v. Dey*, 2 Ch. D. 218; 45 L. J. (Ch.), 611; 24 W. R., 362. W. N., 1877, p. 46 (V. C. H.).

¶ W. N., 1876, p. 122.

** 34 L. T., 124.

**Order IX.,
Rule 2.**

day or two before the case just cited, his lordship gave leave to substitute notice under the present Rule for service. The defendant had a *known* place of residence, i.e. at a club, which appears to be the distinction between *Rafael v. Ongley* and *Cook v. Dey*. The notice was ordered to be given by sending letters addressed to the defendant at his club, and, also, at the office of his solicitor (who had refused to accept service), and by inserting advertisements in the *London Gazette*, *Times*, and one other newspaper.

"Such order as may seem just." This gives the Court or Judge a general power of directing in what way substituted service may be effected. The Judge of the Probate Division directed substituted service upon a defendant, who could not be found, to be effected by advertisement.*

2. On particular Defendants.**Rule 3.**

When husband and wife are both defendants to the action, service on the husband shall be deemed good service on the wife; but the Court or a Judge may order that the wife shall be served with or without service on the husband.

"Where the writ," says Mr. Archbold,† "is against husband and wife, service on the husband will in general be sufficient." This is the practice at Common Law. The practice in Chancery is, so far, similar. "Where husband and wife," says Mr. Daniel, "are defendants, ordinary service upon the husband alone is sufficient." But he adds:—"If the husband is abroad, and cannot be served, and the subject matter of the suit arises in right of the wife, the plaintiff" may "obtain on *ex parte* motion, supported by affidavit, an order that service upon her alone, in the usual manner, shall be sufficient."‡

In *Whitley v. Honeywell* § the Judge of the Probate Division ordered that substituted service upon the defendant's husband, who could not be found, should be effected by advertisement, subject to the directions of the Registrar.¶

Rule 4.

When an infant is a defendant to the action, service on his or her father or guardian, or, if none, then upon the person with whom the infant resides or under whose care he or she is, shall, unless the Court or Judge otherwise orders, be deemed good service on the infant; provided

* *Whitley v. Honeywell*, 35 L. T., 517; 24 W. R., 851.

† 1 Archbold's Practice, 199, citing *Buncumbe v. Love*, Barnes, 6; *Collins v. Shapland*, Barnes, 462. ‡ Daniel's Chancery Practice, 368.

§ 35 L. T., 517; 24 W. R., 851.

¶ This was in conformity with the former practice.

that the Court or Judge may order that service made or to be made on the infant shall be deemed good service.

Order IX.,
Rule 4.

At Common Law an infant could not have been served personally. The service must have been upon his guardian.

Service on the father or guardian of the infant, and upon the person with whom or under whose care the infant is, is a method of serving infants mentioned in Order VII., Rule 3, of the Consolidated Orders of the Court of Chancery. Under that Order service at the dwelling of the mother of the infant, the father being dead, and she married again, has been held to be sufficient,* but not service upon the infant's uncle.†

Leave may be granted in a suit in Chancery, to personally serve infants out of the jurisdiction, and upon such service, guardians *ad litem* will be appointed.

Ordinary service in Chancery upon an infant defendant is effected in the same manner as upon an adult.‡

Rule 5.

When a lunatic or person of unsound mind not so found by inquisition is a defendant to the action, service on the committee of the lunatic or on the person with whom the person of unsound mind resides or under whose care he or she is, shall, unless the Court or Judge otherwise orders, be deemed good service on such defendant.

This is a beneficial change in the law of service. Prior to this enactment it was held at Common Law that personal service was necessary in the case of an action against a lunatic. The Courts at Westminster Hall, on a literal interpretation of s. 17 of the Common Law Procedure Act, 1852, have held that, as the lunatic cannot know of the writ or evade its service, they could not give the plaintiff leave to proceed, in the case of an action against a lunatic, under that section. The managers of the lunatic asylums were able to keep the process server at bay, in the case of *Williamson v. Maggs*,§ on the authority of *Holmes v. Service*,|| decided in 1854.

Order VII., Rule 3, of the Consolidated Orders of the Court of Chancery, mentions service upon the person with whom or under whose care the defendant is, as a method of serving persons of unsound mind.

3. On Partners and other Bodies.

Rule 6.

Where partners are sued in the name of their firm, the writ shall be served either upon any one or more of

* *Hitch v. Wells*, 8 Beav., 576.

† *Blackmore v. Howett*, 20 L. J., 101.

‡ *Daniel's Chancery Practice*, 368, 376.

§ 28 L. J., Ex., 5.

|| 15 C. B., 293.

Order IX.,
Rule 6.

the partners, or at the principal place, within the jurisdiction, of the business of the partnership, upon any person having at the time of service the control or management of the partnership business there; and, subject to the Rules hereinafter contained, such service shall be deemed good service upon the firm.

"Where partners are sued in the name of their firm." By Order XVI. Rule 10, *infra*, "any two or more persons, being liable as co-partners, may be sued in the name of their respective firms."

There were no special provisions relative to the service of partners at the Common Law. The rule that where there are more defendants than one, each must be served in the same way as if he were sued alone, applied. It has been expressly decided* that service on one of two (or more) partners is not, in the view of a Court of Equity, good service on the other. But it has been also expressly decided† that where substituted service is allowed, service on one of two (or more) partners is, in the view of a Court of Equity, sufficient. It will be seen that service may be effected upon a firm, not merely by serving any one of the partners, but by serving "any person having the control or management of the partnership business," provided that the service be upon the latter "at the principal place (within the jurisdiction) of the business of the partnership."

The present Rule effects a very salutary improvement of the law.

"Subject to the Rules hereinafter contained." This, probably, refers more particularly to Rule 7, which applies to "any body or number of persons, whether corporate or otherwise," and is, therefore, to some extent, in *pari materid* with the present Rule.

See also, as to partners, Order VII., Rule 2; Order XII., Rule 12; Order XVI., Rule 10; Order XLII., Rule 8; and the next Rule.

The Rule does not apply to actions under the Bills of Exchange Act.‡

Rule 6a.

Where one person, carrying on business in the name of a firm apparently consisting of more than one person, shall be sued in the firm name, the writ may be served at the principal place, within the jurisdiction, of the business so carried on, upon any person having at the time of service the control or management of the business there; and, subject to any of the Rules of the Supreme Court, such service shall be deemed good service on the person so sued.

This new Rule was added by Rule 8 of the Rules of the Supreme Court, June, 1876.

* *Young v. Goodson*, 2 Russ., 25.

† *Carrington v. Cantillon*, Bunbury, 187; *Coles v. Gurney*, 1 Mad., 187; *Kinder v. Forbes*, 2 Beav., 503. ‡ *Pollock v. Campbell*, 1 Charley's Cases (Chambers), 32.

was decided, in the case of *O'Neil v. Clason*,* by the Divisional Court of the Queen's Bench, Common Pleas, and Exchequer Divisions, that this enabled the plaintiff, O'Neil, to effectually serve the defendant, Clason, who was resident out of the jurisdiction, by serving the writ upon the manager of his London house. The reason was that Clason carried on business in London in the name of "Clason & Company," and therefore came within the express terms of the new Rule, and Order XI., Rule 1, consequently, did not apply.

Order IX.,
Rule 6a.

Rule 7.

Whenever by any statute, provision is made for service of any writ of summons, bill, petition, or other process, upon any corporation, or upon any hundred, or the inhabitants of any place, or any society or fellowship, or any body or number of persons, whether corporate or otherwise, every writ of summons may be served in the manner provided.

The statute 7 Wm. IV. and 1 Vict. c. 73, s. 26, provides, with reference to trading companies, or bodies of persons associated together for banking purposes, and established by letters patent under the Act, that service of any writ on the clerk† of the company or body, or by leaving the writ at the head office for the time being of the company or body, or in case the clerk shall not be found or known, the service of such writ on any agent or officer employed by the company or body, by leaving the same at the usual place of abode of such agent or officer, shall be deemed good and sufficient service on the company or body.

By the 132nd section of the Companies' Clauses Consolidation Act (8 & 9 Vict. c. 16), any summons or writ, requiring to be served upon a company to which the Act applies, may be served by being left at or transmitted through the post directed to the principal office‡ of the company or one of their principal offices where there shall be more than one, or being given personally to the secretary,§ or, in case there be no secretary, then by being given to any one director of the company. The Railway Clauses Consolidation Act (8 & 9 Vict. c. 20), s. 138, contains a similar provision as to service upon the companies to which it applies.

By the Companies Act, 1862, section 62, any summons required to be served upon the company under it may be served by leaving the summons at the head office or sending it through the post in a prepaid letter, addressed to the company at their registered office.¶

* 46 L. J. (Q. B.), 191.

† The word "clerk" here means chief clerk, not a mere clerk employed under a secretary or other clerk. *Walton v. The Universal Salvage Co.*, 6 M. and W. 438.

‡ See *Garton v. the Great Western Railway Company*, E. B. and E., 837.

§ See *Doe d. Bayes v. Roe*, 16 M. and W., 142; *Doe d. Bromley v. Roe*, Dowl., 858.

¶ As to the time of posting the summons and proof of service of it through the post, see section 63.

**Order LX.,
Rule 7.**

Section 16 of the Common Law Procedure Act, 1852, provides that "every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation; and every such writ issued against the inhabitants of a hundred or other like district may be served on the high constable thereof, or any one of the high constables thereof; and every such writ issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town or place, not being part of a hundred or other like district, or some peace officer thereof."

Under this enactment, taken in connection with the 18th and 19th sections of the same Act, the strange anomaly existed that, while foreign corporations could *sue*, as plaintiffs, in England,* foreign corporations were not *suable*, as defendants,† unless they carried on business in England.‡ This anomaly has been removed by the Supreme Court of Judicature Acts. By the Interpretation Clause of this Schedule, Order LXIII., "‘person’ shall include a body corporate or politic;" and by the Interpretation Clause of the Principal Act, s. 100, which is incorporated with this Schedule by Order LXIII., "defendant" shall include every person served with any writ of summons or process, or served with notice of or entitled to attend any proceedings. Order XI., Rule 1, *infra*, which stands in place of s. 19 of the Common Law Procedure Act, 1852, is absolutely without any restriction as to the "persons" out of the jurisdiction, who may, by leave of the Court, be sued. On the strength of these authorities it has been decided that a foreign corporation, although it does not carry on business within the jurisdiction, can *now* be sued. See *Westman v. The Aktibolagst Ekmans Mekaniska Snickerifabrick Company*,§ and *Scott v. The Royal Wax Candle Company*.|| Notice of the writ and not the writ itself must be served on the foreign corporation.

4. In particular Actions.**Rule 8.**

Service of a writ of summons in an action to recover land may, in case of vacant possession, when it cannot otherwise be effected, be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property.

This Rule is copied from section 170 of the Common Law Procedure Act, 1852, with the addition of the important qualification, "when it cannot be otherwise effected."

* *The Dutch West India Company v. Van Moses*, 1 Str., 612; *Henriques v. The Dutch West India Company*, 2 Ld. Raym., 1532.

† *Ingate v. The Austrian Lloyds Company*, 4 C. B. (N. S.), 704; 27 L. J. (C. P.), 323.

‡ *Newby v. Van Oppen*, 7 L. R., Q. B., 293; 20 W. R., 383.

§ 1 Ex. D., 237; 45 L. J. (Ex.), 327; 24 W. R., 405.

|| 1 Q. B. D., 404; 45 L. J. (Q. B.), 586; 34 L. T., 683; 24 W. R., 668.

Where a landlord or lessor proceeds for the recovery of a dwelling-house and other premises demised by one lease, if the dwelling-house is not occupied and the rest of the premises is in the occupation of a tenant, service of the writ of ejectment may be effected by personally serving the tenant with a copy and affixing another on the front door of the house. *Lord Clinton v. Wales*.*

**Order IX.,
Rule 8.**

See, as to substituted service in an action of ejectment, *Crane v. Jullion*.† Judgment in default of appearance, in an action of ejectment, can only be signed after a Judge's order has been obtained, although the writ of summons may have been duly served under the present Rule.‡

Rule 9.

In Admiralty actions in rem, the writ shall be served by the Marshal or his substitutes, whether the property to be arrested be situate within the port of London or elsewhere within the jurisdiction of the Court, and the solicitor issuing the writ shall, within six days from the service thereof, file the same in the Registry from which the writ issued.

This Rule is copied from Rule 14 of the Rules of the Court of Admiralty, "writ" being substituted for "warrant," and "solicitor" for "proctor," and the words "from which the writ issued" being added at the end of the Rule.

The Rule is annulled by Rule 5 of the Rules of the Supreme Court, December, 1875, but is reproduced by that Rule, with the substitution of the words, "warrant of arrest" for "writ," and the omission of the words at the end, "from which the writ issued."

Rule 9a.

Order IX., Rule 9, of "The Rules of the Supreme Court," is hereby annulled, and the following shall stand in lieu thereof:

In Admiralty actions *in rem* the warrant of arrest shall be served by the Marshal or his substitutes, whether the property to be arrested be situate within the port of London or elsewhere within the jurisdiction of the Court, and the solicitor issuing the warrant shall, within six days from the service thereof, file the same in the Registry.

This new Rule is substituted for Rule 9 by Rule 5 of the Rules of the Supreme Court, December, 1875. The substitution was rendered necessary by the separation of the writ of summons from the warrant of arrest. See Order II., Rule 7a, and Order V., Rule 11a, and the forms therein referred to.

* 2 Jur. (N.S.), 1096, Ex., M. T. 1856.

† 2 Ch. D., 220; 24 W. R., 691.

‡ 1 Charley's Cases (Chambers), 40.

Order IX.,
Rule 10.*Rule 10:*

In Admiralty actions in rem service of a writ of summons against ship, freight, or cargo on board, is to be effected by the Marshal or his officer nailing or affixing the original writ for a short time on the mainmast or on the single mast of the vessel, and, on taking off the process, leaving a true copy of it nailed or fixed in its place.

"The service," observe the authors of "Admiralty Practice,"* writing with regard to Admiralty actions *in rem*, "is effected with respect to a ship, her tackle and furniture, by affixing the original warrant for a short time on the mainmast or single mast of the ship, and by leaving a copy thereof annexed in its stead. If the cargo be on board the ship and is proceeded against specifically, and named in the warrant, or if it is not named in the warrant, but is proceeded against in respect of freight due for the transportation thereof, the arrest of the ship arrests the cargo."

The present Rule is annulled by Rule 6 of the Rules of the Supreme Court, December, 1875; but that Rule reproduces the present one, with the omission of the words, "the Marshal or his officer."

Rule 10a.

Order IX., Rule 10, of "The Rules of the Supreme Court," is hereby annulled, and the following shall stand in lieu thereof:

In Admiralty actions *in rem*, service of a writ of summons against ship, freight, or cargo on board, is to be effected by nailing or affixing the original writ for a short time on the mainmast or on the single mast of the vessel, and, on taking off the process, leaving a true copy of it nailed or fixed in its place.

This new Rule was added by Rule 6 of the Rules of the Supreme Court, December, 1875. The effect of the substitution of this Rule for Rule 10 is to enable *any person* to serve a writ of summons in an Admiralty action *in rem*; "the Marshal or his officer" were previously the only persons who could serve it. This was in conformity with Rule 14 of the High Court of Admiralty:—"Every warrant shall be served by the Marshal or his substitutes." But by Order II., Rule 7a, and Order V., Rule 11a, and the forms annexed to those Rules, the warrant is separated from the writ of summons; and any person may, under the present Rule, serve the writ of summons in an Admiralty action *in rem*, just like a writ of summons in an ordinary action.

Rule 11.

If the cargo has been landed or transhipped, service of the writ of summons to arrest the cargo and freight

* Williams and Bruce on Admiralty Practice, pp. 193, 194.

shall be effected by placing the writ for a short time on the cargo, and, on taking off the process, by leaving a true copy upon it. Order IX.,
Rule 11.

“If the cargo,” observe the authors of “Admiralty Practice,”* “has been landed and warehoused, a separate arrest of it must be made.”

Rule 12.

If the cargo be in the custody of a person who will not permit access to it, service of the writ may be made upon the custodian.

“If the Marshal or his substitutes,” observe the authors of “Admiralty Practice,”† “are denied access to the warehouse where the cargo is, the arrest may be made by showing the original warrant to the warehouse keeper and leaving a copy with him.”

Generally.

Rule 13.

The person serving a writ of summons shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default; and every affidavit of service of such writ shall mention the day on which such indorsement was made.

This Rule is copied from s. 15 of the Common Law Procedure Act, 1852, the words “and he is hereby required,” being omitted after the word “shall” and “in default,” substituted for “under this Act.”

This indorsement may be signed by a marksman, but service should not be effected by a marksman.‡ If the indorsement is not made, the plaintiff’s solicitor may be liable for the neglect to make it, when the plaintiff has been damaged thereby.§ The affidavit should show that the writs and indorsements are regular,|| and a copy of the writ should be annexed.

The affidavit cannot be made before the plaintiff’s solicitor or his clerk, nor before the solicitor in the country, if his agent in town is the solicitor in the action.¶ It may, of course, subject to these remarks, be sworn before a commissioner for taking affidavits.

* Williams and Bruce on Admiralty Practice, p. 194. † *Ib.*

‡ *Baker v. Coghlan*, 7 C. B., 131.

§ *Curlewis v. Broad*, 1 H. & C., 322.

|| *Wakeley v. Teesdale*, 2 L. M. & P., 85.

¶ *In Re Gray*, 21 L. J. (C. B.), 380. Reg. Gen., Hil. T., 1853, Rules 42 and 143.

Order IX.,
Rule 10.

Rule 10:

In Admiralty actions in rem service of a writ of summons freight, or cargo on board, is to be effected by the Marshal or by affixing the original writ for a short time on the mainmast of the vessel, and, on taking off the process, leaving it nailed or fixed in its place.

"The service," observe the authors of "Admiralty Practice" with regard to Admiralty actions *in rem*, "is effected on ship, her tackle and furniture, by affixing the original writ on the mainmast or single mast of the ship, and by therewith annexed in its stead. If the cargo be on board proceeded against specifically, and named in the warrant named in the warrant, but is proceeded against in respect for the transportation thereof, the arrest of the ship arrests the cargo."

The present Rule is annulled by Rule 6 of the Rules of the Court, December, 1875; but that Rule reproduces the present omission of the words, "the Marshal or his officer."

Rule 10a.

Order IX., Rule 10, of "The Rules of the Court," is hereby annulled, and the following in lieu thereof:

In Admiralty actions *in rem*, service of summons against ship, freight, or cargo on board is to be effected by nailing or affixing the original writ for a short time on the mainmast or on the single mast of the ship, and, on taking off the process, leaving it nailed or fixed in its place.

This new Rule was added by Rule 6 of the Rules of the Court, December, 1875. The effect of the substitution of this Rule is to enable any person to serve a writ of summons in an action *in rem*; "the Marshal or his officer" were previously the only persons who could serve it. This was in conformity with Rule 14 of the Rules of Admiralty: "Every warrant shall be served by the Marshal or his officer." But by Order II., Rule 7a, and Order V., forms annexed to those Rules, the warrant is separated from the summons, and any person may serve the summons, under the present Rule, as in an Admiralty action *in rem*, just like a writ in an ordinary action.

Rule 11.

If the cargo is landed or transported, the Marshal is to arrest the cargo.

* Writs in Admiralty Practice

**Order IX.,
Rule 13.**

The present Rule applies only to *personal* service. It has no application to a writ of summons served pursuant to an order for *substituted* service under Rule 2 of this Order and Order X. No indorsement of the day of the month and week of service is necessary in the case of such a writ.*

The principle of this decision was subsequently affirmed by the Court of Appeal, overruling Jessel, M. R., in the case of *Dymond v. Croft*,† where a precisely similar question arose.

The ground of the view taken of the present Rule was stated, in *Dymond v. Croft*, by Mr. Justice Lush, to be, that “the 15th section of the Common Law Procedure Act, 1852, from which the Rule is taken, applied only to *personal* service.

ORDER X.

SUBSTITUTED SERVICE.

Every application to the Court or a Judge, under Order IX., Rule 2, for an order for substituted or other service, or for the substitution of notice for service, shall be supported by an affidavit setting forth the grounds upon which the application is made.

See, as to substituted service, Order IX., Rule 2, *supra*, and the note thereto.

“The application,” says Mr. Daniel,‡ “is made by *ex parte* motion,§ and must be supported by an affidavit showing what efforts have been made to serve the defendant, and that all practicable means of doing so have been exhausted,|| and how substituted service is proposed to be effected.” The affidavit must also show “means of knowledge.”¶

On an affidavit of service of the writ being filed, judgment may be signed. It is not necessary that the writ should be indorsed, under Order IX., Rule 13, *supra*, with “the day of the month and week of the service thereof.” Order IX., Rule 13, only applies to *personal* service.**

ORDER XI.

SERVICE OUT OF THE JURISDICTION.

Rule 1.

Service out of the jurisdiction of a writ of summons or notice of a writ of summons†† may be allowed by the

* *Cruse v. Kuttingell*, 1 Charley's Cases (Chambers), 40.

† 3 Ch. D., 512; 45 L. J. (Ch.), 604; 24 W. R., 842; 34 L. T., 786.

‡ Chancery Practice, 373.

§ *Reed v. Barton*, 4 W. R., 793, V. C. W.; *Re Boger*, 3 Jur., N. S., 930, V. C. W.

|| *Firth v. Bush*, 9 Jur., N. S., 431, V. C. K.

¶ See the form, in the Vol. of Forms, accompanying Daniel's Chancery Practice, No. 286.

** *Cruse v. Kuttingell*, *ubi supra*.

†† This Order applies to a summons taken out by a liquidator under the Companies Act, 1862, ss. 100, 165. In *Re The British Imperial Co.*, 5 Ch. D., 749.

Court or a Judge whenever the whole or any part of the subject-matter of the action is land or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the jurisdiction.

Order XI.,
Rule 1.

See Order II., Rule 4, *supra*.

The provisions relative to "service out of jurisdiction" in the Principal Act will be found in Rule 6 of that Act.

The present Rule is very carefully framed with a view to extending as widely as possible the right of serving a defendant out of the jurisdiction, a question which has been greatly clouded by the conflicting decisions of the Courts and Judges of Westminster Hall.

The language of the 18th section of the Common Law Procedure Act, 1852, on which these conflicting decisions arose, is as follows:—"It shall be lawful for the Court or a Judge to direct that the plaintiff shall be at liberty to proceed, upon being satisfied that there is a cause of action, which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction."

The words, "cause of action," were held by the Court of Queen's Bench to mean, as they termed it, the *whole* cause of action, including, in the case of a contract, the formation of the contract and the breach of the contract. Unless the contract were formed and the breach of it occurred within the jurisdiction, the Court of Queen's Bench refused* to allow the plaintiff to proceed under the 18th section of the Common Law Procedure Act, 1852.

The Court of Exchequer held the same opinion in one case,† decided prior to *Allhusen v. Malgarejo*, and which seems to have misled the Court of Queen's Bench in that case; but the Court of Exchequer in later cases,‡ practically overruled their former decision, though struggling to distinguish it.

* *Allhusen v. Malgarejo*, L. R., 3 Q. B., 340; *Cherry v. Thompson*, W. N., 1872, p. 122. † *Sichel v. Borch*, 2 H. and C., 954.

‡ *Durham v. Spence*, L. R., 6 Ex., 46 (Kelly, C.B., however, *dissentiente*); *Arrowsmith v. Chandler*, 52 L. T., 270 (Bramwell, B., tried to distinguish *Sichel v. Borch*).

Order XI.,
Rule 1.

The Court of Common Pleas was consistent throughout in adhering to the liberal interpretation of the section, that, if the breach of the contract occurred within the jurisdiction it mattered not where the contract was made. It is evident that unless this construction be put upon the section, the words "or in respect of a breach of a contract made within the jurisdiction" are mere surplusage. "The cause of action" is evidently a synonym for "the breach of the contract or the tort."

The common sense view of the Court of Common Pleas, and, in its later mood, of the Court of Exchequer, has, it will be seen, been adopted by the Legislature. The perilous expression, "cause of action," has been carefully eschewed, and the cases in which the Court or a Judge will allow service out of the jurisdiction are logically classed under three heads:—

First, "Whenever the contract, which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected, or for the breach whereof damages or other relief are or is demanded, was made or entered into within the jurisdiction." Secondly, "Whenever there has been *a breach within the jurisdiction of any contract, wherever made.*" Thirdly, "Whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within the jurisdiction." It will be seen that the first class corresponds with the second class mentioned in s. 18 of the Common Law Procedure Act, 1852. The third class has always been held to be within the first class mentioned in the 18th section. The second class clears up the doubts as to whether contracts entered into abroad fall under the first class of the 18th section, or do not come within the scope of the 18th section at all.

The adoption of the more liberal construction will be a great boon to the mercantile community in these days, when every country in the world is the scene of the formation of contracts by English merchants with foreigners and British subjects, resident abroad. The salutary declaration of the law by the present Rule (for it hardly can be called a new enactment) is well-timed, as the Court of Queen's Bench recently* announced its intention of adhering to its narrow construction of the 18th section.

The definition of the "subject matter of the action" would seem to be taken from the Foreign Process Acts, relative to suits in Chancery (2 and 3 Wm. IV. c. 33, ss. 1, 4 and 5 Wm. IV. c. 82, s. 1), only enlarged.† It forms an important qualification to the second class of cases mentioned in this Rule. Although the contract may be formed *out of* the jurisdiction, *the subject matter* of the action must lie *within* it.

It has not been necessary, in the case of an order for service out of the jurisdiction in the Court of Chancery, to show, by affidavit, that the circumstances were such as to warrant the order. The Court might look at the pleadings for that purpose,‡ and, if necessary, go into the merits of the case, it being always in the discretion of the Court to grant or refuse

* *Cherry v. Thompson*, W. N., 1872, p. 122.

† The word, "property," has been added, and it is very wide in its signification.

‡ *Blenkinsopp v. Blenkinsopp*, 8 Beav., 61; *Maclean v. Dawson*, 48 D. J. & J. 150.

the application,* but it acted on a *prima facie* case being made out.† The plaintiff took the order at his own risk.‡

Order XI.,
Rule 1.

“Or notice of a writ or summons.” In *Westman v. The Aktiebolaget Ekmans Mekaniska Snickarifabrik Company*§ it was decided that the distinction created by the Common Law Procedure Act, 1852, sections 18 and 19, between service upon a British subject resident out of the jurisdiction, and service upon a foreigner resident out of the jurisdiction, is still in force. In the former case the writ itself, in the latter notice of the writ, is to be served.

“Act or thing affecting property situate within the jurisdiction.” In *Casey v. Arnott*|| the Common Pleas Division decided that leave could not be given to serve a writ of summons out of the jurisdiction in an action for slander of the plaintiff’s ship, which was in an English port, such slander not being “an act or thing affecting property situate within the jurisdiction,” under the present Rule. The “act” affecting property must, it was said, be some physical act, not merely calling it names, *e.g.*, “unseaworthy.”

“Act done within the jurisdiction.” Except where it has been expressly extended by the legislature, the jurisdiction does not extend beyond low-water mark. *Harris v. The Owners of the “Franconia.”*¶

Sir Robert Phillimore, in the case of *In re Smith*,** refused leave to issue a writ of summons, of which notice was to be given to a foreign corporation, claiming compensation for damages done to the plaintiff’s ship by the ship of the defendant, on the high seas. Sir Robert considered that the old law, under which the High Court of Admiralty possessed no jurisdiction *in personam* over the owners of the ship, unless they could have been served with a citation within the territorial jurisdiction, was unaffected by the present Rule. The Counsel for the plaintiff in this case argued that the collision having occurred on the high seas, it was an “act done within the jurisdiction.” The defendants in the case of *In re Smith* were, it will be perceived, a foreign corporation, and no objection on that ground was raised. A foreign corporation could not have been sued under section 19 of the Common Law Procedure Act, 1852,†† unless they had a place of business in this country.‡‡ A foreign corporation, although it has no place of business in this country, may now be sued under the present Rule. This was so decided in the cases of *Westman v. The Aktiebolaget Ekmans Mekaniska Snickarifabrik*§§ and *Scott v. The Royal Wax Candle Company*.|||

* *Lewis v. Baldwin*, 11 Beav., 153, 158; *Whitmore v. Ryan*, 4 Hare, 612, 617; *Innes v. Mitchell*, 4 Drew., 141; 1 De G. & J., 423; *Maclean v. Dawson*, *ubi supra*.

† *Meikham v. Campbell*, 24 Beav., 100; *Maclean v. Dawson*, *ubi supra*.

‡ *Brooke v. Morrison*, 32 Beav., 652.

§ 1 Ex. D., 237; 45 L. J. (Ex.), 327; 24 W. R., 405.

|| 2 C. P. D., 24; 46 L. J. (C. P.), 3; 35 L. T., 424; 25 W. R., 46.

¶ 2 C. P. D., 173; 46 L. J. (C. P.), 363.

** 1 P. D., 300; 24 W. R., 903.

†† *Ingate v. The Austrian Lloyd’s Company*, 4 C. B. (N. S.), 704; 27 L. J. (C. P.), 323.

‡‡ *Newby v. Van Oppen*, L. R., 7 (Q. B.), 293; 41 L. J. (Q. B.), 148.

§§ 1 Ex. D., 237; 45 L. J. (Ex.), 327; 24 W. R., 405.

||| 1 Q. B. D., 404; 45 L. J. (Q. B.), 586; 34 L. T., 693; 24 W. R. 668; 2 Charley’s Cases (Court), 179.

**Order XL,
Rule 1.**

In *The Great Australian Gold Mining Company v. Martin** the plaintiff company (which was registered in England) obtained leave to serve a writ of summons in New South Wales on the Chief Justice of Sydney, on an affidavit being filed by their late secretary that he believed that the plaintiffs had a good cause of action against the defendant in respect of false representations made by him within the jurisdiction.

In *The Swansea Shipping Company, Limited, v. Duncan*,† it was held by the Court of Appeal, reversing the decision of the Divisional Court for the Common Law Divisions, that the present Rule applies to the service of a notice on a third person, out of the jurisdiction in cases falling under Order XVI., Rule 17. That Rule states expressly that "such notice shall be served on such person according to the rules relating to the service of writs of summons."

Rule 1a.

Whenever an action is brought in respect of any contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, when such contract was made or entered into within the jurisdiction, or whenever there has been a breach within the jurisdiction of any contract, wherever made, the Judge, in exercising his discretion as to granting leave to serve such writ or notice on a defendant out of the jurisdiction, shall have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local Court of limited jurisdiction, having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in England or in the place of such defendant's residence, and in all the above-mentioned cases no such leave is to be granted without an affidavit stating the particulars necessary for enabling the Judge to exercise his discretion in manner aforesaid, and all such other particulars (if any) as he may require to be shown.

* 5 Ch. D., 1; 46 L. J. (Ch.), 289; 35 L. T., 703, 874; 25 W. R., 246.

† 1 Q. B. D., 644; 45 L. J. (Q. B.), 638; 34 L. T., 685; 35 L. T., 879; 25 W. R., 233.

This new Rule was added by the 5th Rule of the Rules of the Supreme Court, June, 1876.

Order ~~IX.~~
Rule 1a.

Under the 18th section of the Common Law Procedure Act, 1852, a writ could not be issued by the Common Law Courts against a British subject residing in Scotland or Ireland. Under the 19th section of that Act a writ might have been issued against a *foreigner* residing in Scotland or Ireland. The reason of this distinction was that the words "in any place except in Scotland or Ireland" were introduced during the passage of the Act through the Legislature at the last moment* into the 18th clause, but no such words were introduced into the 19th clause. It will be seen that no such words occur in the present Rule or in Order II., Rule 4, *supra*. It was, therefore, held, by Mr. Justice Lush† and by Mr. Justice Lindley,‡ at chambers, that where the contract was either made or broken in England, a British subject residing in Scotland could be served with the writ of summons under Rule 1 of this Order, which repeals by implication s. 18 of the Common Law Procedure Act, 1852.

These decisions at Judges' chambers relative to serving writs in Scotland were followed by one in Court relative to serving a writ in Ireland. The proprietor of a Dublin rink had employed a London tradesman by a contract made in England, to construct a rink for him in Dublin at an expense of some £700, for non-payment of which an action in the Queen's Bench Division was brought. There had been an order by Amphlett, B., at chambers, allowing the summons to be served on the defendant in Dublin, against which he now appealed to the Court. The Court (Cockburn, C.J., Mellor, J., and Lush, J.), said that the present was precisely a case in which it would be fit to allow a defendant residing in Ireland to be sued in this country. The order, therefore, must be upheld.§

The *Times*,|| in its report of this case, throws considerable light on the history of the controversy to which these decisions gave rise:—"The result was that many Scotchmen and Irishmen, who had contracted debts in this country and gone back to Scotland or Ireland without paying, found themselves suable in the Courts of this country by their creditors here, which the debtors felt to be a hardship, but their creditors did not. A deputation of Scotch and Irish gentlemen waited upon the Lord Chancellor and represented this as a grievance. His Lordship said on that occasion:—

" 'It was never intended that there should be service out of the jurisdiction in a case of this sort, to bring parties resident in Scotland or Ireland to defend themselves in England.'

" His Lordship also said that the Rules could be altered by the majority of the Judges with his sanction, and that he would bring the subject before them. And it was stated, in the case of *Green v. Browning*,¶ by Mr. Justice Lush, that the Lord Chancellor had since then consulted the Judges, and the matter was under their consideration."

The present new Rule is the outcome of this consideration. It narrows

* Day's Common Law Procedure Acts, p. 45 (n.)

† 1 Charley's Cases (Chambers), 41.

‡ *Preston v. Lamont*, 2 Charley's Cases (Chambers), 16.

§ 34 L. T., 760; W.N., 1876, p. 190; *Times*, Monday, May 29th, 1876.

|| Of Monday, May 29th, 1876.

¶ 34 L. T., 760; W.N., 1876, p. 190.

**Order XI.,
Rule 1a.**

the new right conferred upon English suitors. In favour of the practice under Rule 1 of this Order prior to this Rule, it may be noted that a Scottish plaintiff can sue an English defendant in the Courts of Scotland if he have any property whatever in Scotland.*

Rule 2.

In Probate actions service of a writ of summons or notice of a writ of summons may, by leave of the Court or Judge, be allowed out of the jurisdiction.

The 19th Rule of the Rules and Orders of the Court of Probate in contentious business provides that " citations may be served upon parties resident out of Great Britain and Ireland, by the insertion of the same or of an abstract thereof, settled and signed by one of the Registrars, as an advertisement, in such of the morning and evening London newspapers, and, if necessary, in such local newspapers, at such intervals, as the Judge or a Registrar may direct, provided that in any case the Judge or a Registrar may direct a citation to be served personally. If the party cited be abroad, having an agent resident in England, such agent must be served with a true copy of the citation.

In *Beddington v. Beddington*† leave was given to serve notice of a writ of summons, in an administration suit, on a foreigner resident out of the jurisdiction. Counsel applied, by mistake, in the first instance, for leave to serve the writ of summons.

Rule 3.

Every application for an order for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by evidence, by affidavit, or otherwise, showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made.

This Rule is founded on the Chancery Practice. By Order X., Rule 7, subsection 1, of the Consolidated Orders of the Court of Chancery, the Court, upon application supported by such evidence as shall satisfy the Court in what place or country the defendant is, may order that a copy of the Bill may be served on him there or within such limits as the Court shall think fit to direct. It was established that, under that Order, the Court of Chancery might direct service out of the jurisdiction in any suit whatever.‡

* *London and North Western Railway Company v. Lindsay*, 3 M.Q. H. L., 99; Day's Common Law Procedure Acts, p. 45 (n.)

† 1 P. D., 426; 45 L. J. (P. D. & A.), 44; 34 L. T., 366; 24 W. R., 348.

‡ See the cases collected in note (o), p. 375, Daniel's Chancery Practice.

In *The Great Australian Gold Mining Company v. Martin*,* the affidavit filed by the secretary of the plaintiff company merely followed the form of claim as it appeared on the indorsement of the writ, and stated that the defendant, Sir James Martin, resided at Sydney. The Court of Appeal (Baggallay, L. J., *dissentiente*) held that this was not a compliance with the requirements of the present Rule, as there was no "evidence" of "*the grounds upon which the application*" was "*made*." "The grounds," said Bramwell, L. J., "are that there is a case within Rule 1 of Order XI." The effect of this decision is to assimilate the affidavit for leave to serve the writ, or notice, as much as possible to the affidavit which was required, under s. 18 of the Common Law Procedure Act, 1852, for leave to proceed. The perilous words "cause of action" re-appear in the affidavit although expressly omitted from the Rules. Sir Richard Baggallay, who dissented from the decision, preferred to follow the Chancery practice, which dispensed altogether with the necessity for any affidavit on an application for leave to serve a copy of the Bill. It is noticeable that the words of the present Rule do not imperatively require an affidavit; "evidence by affidavit, *or otherwise*," is the form of expression. Sir George Bramwell seemed to think that the point raised was entirely new and that there was no case upon it. Two cases at chambers had, however, previously arisen.

Order XI,
Rule 3.

Mr. Justice Lush, at chambers, had objected to an affidavit, on which an application was made to serve a writ of summons out of the jurisdiction, because it did not show either that the contract was made, or broken, within the jurisdiction.†

The same learned judge, at chambers, had decided that a general affidavit that "the cause of action arose within the jurisdiction" is not now sufficient to found an order for service out of the jurisdiction.‡

Rule 4.

Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given.

This Rule is founded on the Chancery Practice. It is copied *verbatim* from Order X., Rule 7, subsection (2), of the Consolidated Orders of the Court of Chancery.

In *The Swansea Shipping Company v. Duncan*,§ it was decided that, as Order XVI., Rule 18, says that service of notice upon a third party shall be "according to the Rules relating to the service of writs of summons," Rule 1 of the present Order was applicable to the service of notice upon a third party. The difficulty, however, was pointed out that Rule 20 of Order XVI. requires the third party to enter an appearance "within eight days from the service of the notice," and eight days would be too

* 5 Ch. D., 1; 46 L. J. (Ch.), 289; 35 L. T., 703, 874; 25 W. R., 246.

† 1 Charley's Cases (Chambers), 41.

‡ *Ib.*, 42.

§ 1 Q. B. D., 644; 45 L. J. (Q. B.), 638; 34 L. T., 695; 35 L. T., 879; 25 W. R., 233.

**Order XI.,
Rule 4.**

short a period for appearance in the case of a notice served on a third party out of the jurisdiction. "The answer," said Jessel, M.R., who presided in the Court of Appeal, "to the objection is, that by Rule 4 of Order XI., the order giving leave to serve notice out of the jurisdiction is to name such a time for appearance as the necessity of the case as to time and place requires; and if the number of days allowed for appearance is more than eight, then Rule 20 of Order XVI., must be taken to be so far modified that an appearance within the time limited, though more than eight days, would be sufficient."

Rule 5.

Notice in lieu of service shall be given in the manner in which writs of summons are served.

Notice in lieu of service is confined to the case of actions, pursuant to section 19 of the Common Law Procedure Act, 1852,* against foreigners residing out of the jurisdiction, and foreign corporations.†

ORDER XII.

APPEARANCE.

Rule 1.

Except in the cases otherwise provided for by these Rules a defendant shall enter his appearance in London.

"London" is here used in contradistinction to the districts of District Registries, which are all in the country. By Order XXXVI., Rule 1, where no place of trial is named in the statement of claim, the place of trial shall, unless a Judge otherwise orders, be Middlesex. "London" in the present Rule is practically equivalent to the Metropolitan Offices of the various Divisions of the High Court of Justice, some of which are in the City of London, some in Finsbury, and some in Westminster.

This construction is borne out by the use of the phrase "London Office" in Rules 7 and 8 of this Order, *infra*, as synonymous with "London" in this and other Rules.

"Except in the cases otherwise provided for." This exception relates to appearances in District Registries, as to which see the Rules which follow.

Rule 2.

If any defendant to a writ issued in a District Registry resides or carries on business within the district, he shall appear in the District Registry.

As to the issuing of writs from District Registries, see section 64 of the Principal Act, and Order V., Rule 1, *supra*, and Order XXXV., *infra*, and the cases there cited.

* See Rule 3 of this Order, *supra*.

† See the cases cited under Rule 1 of this Order, *supra*.

It will be perceived that the present Rule is imperative, *not allowing the defendant any option* as to the place in which he is to enter an appearance. The course which he may take, "as of right," but only *after* appearance, to remove the action to London, is prescribed by Order XXXV., Rules 11-14.

Order XII.,
Rule 2.

Rule 3.

If any defendant neither resides nor carries on business in the district, he may appear either in the District Registry or in London.

In this case the defendant has the *option* of selecting the place in which he shall enter an appearance. He need not wait till after appearance to show his preference for London; but may show it at once by entering an appearance in London.

Notwithstanding the language, however, of this Rule, it has been held that the proper place for a defendant who is sued under the Summary Procedure on Bills of Exchange Act, 18 and 19 Vict., c. 67, in a District Registry, although he neither resides nor carries on business in the district, to apply for leave to appear, is the District Registry, and the writ need not, therefore, give him notice, pursuant to Order V., Rule 2, that he has an option of appearing either in the District Registry or in London. By Order II., Rule 6, "the procedure under the Bills of Exchange Act" is applicable, and it is part of the procedure under that Act that leave to appear must be obtained; this leave it is now decided must be sought at the place out of which the writ issues, *i.e.*, in the District Registry. Application, however, may, notwithstanding, be made to a Judge at chambers, in London, for leave to appear in London.*

Where leave is given to enter an appearance in London in an Admiralty cause *in rem*, in a District Registry of the High Court of Admiralty, commenced before November the 1st, 1875, the Memorandum of Appearance must recite the institution of the cause in the District Registry of the High Court of Admiralty, must show the title of the cause in the District Registry, and must state that the defendants reside out of the jurisdiction of that Registry.†

Rule 4.

If a sole defendant appears, or all the defendants appear in the District Registry, or if all the defendants who appear, appear in the District Registry, and the others make default in appearance, then, subject to the power of removal hereinafter provided, the action shall proceed in the District Registry.

* *Oger v. Bradnum*, 1 C. P. D., 334; 45 L. J. (C.P.), 273; 34 L. T., 578; 24 W. R., 404; 2 Charley's Cases (Court), 132.

† *The "General Birch"*, 33 L. T., 792; 24 W. R., 24; 2 Charley's Cases (Court), 91.

**Order XII,
Rule 4.**

This Rule is imperative—"the action *shall* proceed in the District Registry."

"Subject to the power of removal hereinafter provided," i.e., by Order XXXV., Rules 11-14, *infra*.

The defendants, a railway company, having obtained an order in London from the Master for further time to plead, in an action commenced and carried on in a District Registry, the order of the Master was directed to stand and the action was removed to London, but the defendants were visited with the costs of the application and of all proceedings in the District Registry after writ, for failure to give notice under Order XXXV., Rule 12.*

Rule 5.

If the defendant appears, or any of the defendants appear, in London, the action shall proceed in London; provided that if the Court or a Judge shall be satisfied that the defendant appearing in London is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such Court or Judge may order that the action may proceed in the District Registry notwithstanding such appearance in London.

There is a power of applying for the removal of an action from London to a District Registry, under Order XXXV., Rule 13, *infra*.

Rule 6.

A defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing dated on the day of the delivering the same, and containing the name of the defendant's solicitor, or stating that the defendant defends in person. A defendant who appears elsewhere than where the writ is issued shall on the same day give notice to the plaintiff of his appearance, either by notice in writing served in the ordinary way, or by prepaid letter posted on that day in due course of post.

The first clause of this Rule is founded on s. 31 of the Common Law Procedure Act, 1852. The form of the memorandum is given in that section. The form of the memorandum mentioned in the present Rule is given in Appendix (A), Part I., No. 6, *infra*. See Rule 10 of this Order, *infra*.

The memorandum may be delivered by a third person on the defendant's behalf, though such third person is not a solicitor. *Oake v. Moorecroft*.†

The notice saves a *double* search for appearance.

The present Rule has been annulled by Rule 5 of the Rules of the

* 2 Charley's Cases (Chambers), 17.

† L. R., 5 Q. B., 76.

Supreme Court, February, 1876, which, however, reproduces the Rule, with the substitution of the words "to the plaintiff's solicitor or to the plaintiff himself if he sues in person," for "to the plaintiff," and the addition of the words "at the address for service within the district of the District Registry," and "directed to such address." For the reason for the alterations of the Rule, see the note to Rule 6a, *infra*.

Order XII.,
Rule 6.

Rule 6a.

Order XII., Rule 6, is hereby annulled, and the following shall stand in lieu thereof:—

A defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing dated on the day of delivering the same, and containing the name of the defendant's solicitor, or stating that the defendant defends in person.

A defendant who appears elsewhere than where the writ is issued, shall on the same day give notice of his appearance to the plaintiff's solicitor, or to the plaintiff himself if he sues in person, either by notice in writing served in the ordinary way at the address for service within the district of the District Registry, or by prepaid letter directed to such address, and posted on that day in due course of post.

This new Rule, added by the 5th Rule of the Rules of the Supreme Court, February, 1876, reproduces Rule 6 of this Order, with the substitution of the words "to the plaintiff's solicitor, or to the plaintiff himself, if he sues in person," for "to the plaintiff," and the addition of the words "at the address for service within the district of the District Registry," and "directed to such address," in the second part of the new Rule.

Mr. Justice Lindley decided, at chambers, that where the defendant enters an appearance in London to an action commenced in a District Registry, notice of the appearance to the London agents of the plaintiff's solicitor is sufficient, and that it is not necessary to give notice to the plaintiff *in person*.* Mr. Justice Lindley based his decision on Order XIII., Rule 5a. Order XIII., Rule 5a, would seem to have been intended to give the agent of the defendant in London time to write to the solicitor of the plaintiff in the country. It might, however, mean that the London agent of the defendant should communicate at once with the London agent of the plaintiff, with a view to the latter writing to the solicitor of the plaintiff in the country by that night's post.

The present new Rule clearly requires notice to be sent direct by the London agent of the defendant to the solicitor of the plaintiff in the country, and thus overrules Mr. Justice Lindley's decision.

* *Johnston v. Whitehead*, 1 Charley's Cases (Chambers), 42.

Order XII.,
Rule 7.

Rule 7.

The solicitor of a defendant appearing by a solicitor shall state in such memorandum his place of business, and, if the appearance is entered in the London Office, a place, to be called his "address for service," which shall not be more than three miles from Temple Bar, and, if the appearance is entered in a District Registry, a place, to be called his "address for service," which shall be within the district.

As to the "address for service" of the plaintiff's solicitor, see the note to Rule 1 of Order IV., *supra*.

Rule 8.

A defendant appearing in person shall state in such memorandum his address, and, if the appearance is entered in the London Office, a place to be called his "address for service," which shall not be more than three miles from Temple Bar, and, if the appearance is entered in a District Registry, a place, to be called his "address for service," which shall be within the district.

As to the "address for service" of a plaintiff suing in person, see the note to Order IV., Rule 2.

Rule 9.

If the memorandum does not contain such address, it shall not be received; and if any such address shall be illusory or fictitious, the appearance may be set aside by the Court or a Judge, on the application of the plaintiff.

This Rule is copied from s. 30 of the Common Law Procedure Act, 1852, the words, "on the application of the plaintiff," being added.

See as to the subject-matter of this Rule, s. 30 of the Common Law Procedure Act, 1852, and Rule 166 of the Reg. Gen., Hil. T., 1853. See also Order IV., Rule 2, *supra*, and the note thereto. The indorsement is substituted for the entry in a book.

Rule 10.

Order, XII.,
Rule 10.

The Memorandum of Appearance shall be in the Form No. 6, Appendix (A), Part I., with such variations as the circumstances of the case may require.

The analogous form is given in s. 31 of the Common Law Procedure Act, 1852. It has been laid down* that that Act imperatively requires that the form given in the 31st section, or one to the like effect, shall be used. The present Rule admits of "such variations as the circumstances of the case may require."

The whole style of the new form is different from that of the old appearance-piece. It is, in effect, a *præcipe* to the officer to enter an appearance, which by the next Rule, the officer is enjoined to do. A reference to the forms accompanying Daniel's Chancery Practice † will show that this new kind of memorandum is borrowed from the practice of the Court of Chancery. Nothing is said here about *filing* it, but see the Form itself, *infra*. As to giving notice of it, see Rule 6a, *supra*.

Where the defendant in an Admiralty action *in rem* or *in personam* intends to object to the jurisdiction of the Court, he should still appear *under protest*.‡ An appearance under protest is entered in the same manner as an ordinary appearance, save that the words "under protest" are inserted in the memorandum.

Rule 11.

Upon receipt of a Memorandum of Appearance, the officer shall forthwith enter the appearance in the Cause Book.

See the note to Order V., Rule 8, *supra*, as to the additional labour which this Rule involves, and as to the Cause Book.

The *præcipe* to enter an appearance is, in Chancery Practice, "left at the seat of the Record and Writ Clerk, to whose division the cause is attached." §

Rule 12.

Where partners are sued in the name of their firm, they shall appear individually in their own names. But all subsequent proceedings shall, nevertheless, continue in the name of the firm.

See Rule 11 of the Principal Act.

See, also, Order IX., Rules 6 and 6a, and the notes thereto, *supra*, and Order XVI., Rules 10 and 10a, *infra*.

* Per Pollock, C.B., 4 D. & L., 297.

† No. 484.

‡ The "*Vivar*," 2 P. D., 29; 35 L. T., 782; 25 W. R., 453. See s. 18 of this Act, *supra*, by which the Admiralty Rules are preserved.

§ Daniel's Chancery Practice, 459-60.

Order XII.,
Rule 12a.

Rule 12a.

Where any person, carrying on business in the name of a firm apparently consisting of more than one person, shall be sued in the name of the firm, he shall appear in his own name; but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

This new Rule was added by Rule 6 of the Rules of the Supreme Court, June, 1876.

By Order XVI., Rule 10a, which was added at the same time, "any person carrying on business in the name of a firm apparently consisting of more than one person may be sued in the name of the firm."

Rule 13.

If two or more defendants in the same action shall appear by the same solicitor and at the same time, the names of all the defendants so appearing shall be inserted in one memorandum.

This Rule is copied *verbatim* from Reg. Gen., Hil. T., 1853, Rule 2, except that "solicitor" is substituted for "attorney," and "memorandum" for "appearance."

Rule 14.

A solicitor not entering an appearance in pursuance of his written undertaking so to do on behalf of any defendant shall be liable to an attachment.*

This Rule is copied *verbatim* from Reg. Gen., Hil. T., 1853, Rule 3, with the important modification that the word "written" is inserted before the word "undertaking." See as to this Rule, Order IX., Rule 1, *supra*.

Rule 15.

A defendant may appear at any time before judgment. If he appear at any time after the time limited for appearance he shall, on the same day, give notice thereof to the plaintiff's solicitor, or to the plaintiff himself

* See Order XLIV., *infra*.

if he sues in person, and he shall not, unless the Court or a Judge otherwise orders, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ.

Order XII.,
Rule 15.

This Rule is founded on s. 29 of the Common Law Procedure Act, 1852; but the frame of it is rather different, the proviso relating to notice being thrown into a positive form, instead of being inserted parenthetically.

The important words, "unless the Court or a Judge otherwise orders," are also introduced after the word "not."

See the case of *The "Vivar,"** cited under Rule 10 of this Order, *supra*, as to appearing under protest in an Admiralty action *in rem* or *in personam*.

Rule 16.

In Probate actions any person not named in the writ may intervene and appear in the action as heretofore on filing an affidavit showing how he is interested in the estate of the deceased.

It was a rule of the Prerogative Court, that, when a suit was pending, a party, whose interest might by possibility be affected by the suit, should be allowed to intervene to protect his interest.† He was called an "intervener."

By Rule 6 of the Rules and Orders in contentious business of the Court of Probate, "parties who, previously to the passing of the Court of Probate Act, 1857, had a right to intervene in a cause, may do so, *with leave of the Judge or of the Registrars*, obtained by order or summons, subject to the same limitations and the same rules as to costs as in the Prerogative Court."

"The distinction," it has been observed,‡ "between an intervener and a defendant, properly so-called, would seem to be this, viz., that an intervener is a person who puts in an appearance in a suit while the suit is pending. If a person puts in an appearance in answer to a citation, served upon him by the plaintiff at the commencement of the suit, he is called a defendant."

Rule 17.

In an Admiralty action *in rem* any person not named in the writ may intervene and appear as heretofore, on filing an affidavit showing that he is interested in the *res* under arrest, or in the fund in the Registry.

The writ of summons in an Admiralty action *in rem* calls upon the owners and parties interested in the ship "or cargo," to enter in the

* 2 P. D., 29; 35 L. T., 782; 25 W. R., 453.

† Coote and Tristram's Probate Practice, 257.

‡ *Ib.*

Order XII. Registry an appearance in the cause. As a general rule, not the legal owner, but any person having any title to the property pro-
Rule 17. against may appear and defend *pro interesse suo*.*

Rule 18.

Any person not named as a defendant in a writ of summons for the recovery of land may by leave of the Court or Judge appear and defend, on filing an affidavit showing that he is in possession of the land either himself or his tenant.

This rule is copied *verbatim* from section 172 of the Common Law Procedure Act, 1852, "recovery of land" being equivalent to ejectment. Persons claiming in opposition to the title of the tenant in possession were not admitted to defend under that section.†

The "writ of summons" is the same as in other actions, except that the endorsement of claim is different. See App. (A), Part II., s. 1, "Ejectment."

The affidavit of the person applying for leave to appear and defend must show that he is in possession of the premises, by himself or his tenant. The Court will not, however, consider nice questions as to the applicant's right of possession.‡

A form of affidavit by an application for leave to appear in this case will be found in Chitty's "Forms," § and also a form of the Judge's Order, giving him leave to appear.†

See, further, as to the recovery of land, Order XVII., Rule 2; Order XIX., Rule 15; Order XXIX., Rules 7 and 8; Order XLII., Rule 8; Order XLVIII.; and Rules 19—21, *infra*, of this Order.

Rule 19.

Any person appearing to defend an action for the recovery of land as landlord in respect of property whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord.

This Rule is copied *verbatim* from section 173 of the Common Law Procedure Act, 1852.

The tenant will not, by the landlord being joined, be precluded from setting up any defence which he may have as tenant in possession.¶

A form of appearance by a landlord not named in the writ will be found in Chitty's "Forms."**

See the note to the last Rule.

* Williams and Bruce's Admiralty Practice, p. 199.

† *Doe v. Horton v. Rys*, 2 Y. & J., 88.

‡ *Croft v. Lumley*, 4 E. & B., 614. § P. 535.

¶ *Doe d. Wain v. Horn*, 3 M. and W., 333.

|| P. 536.
 ** P. 536.

Rule 20.

Order XII.,
Rule 20.

Where a person not named as defendant in any writ of summons for the recovery of land has obtained leave of the Court or Judge to appear and defend, he shall enter an appearance according to the foregoing rules, intituled in the action against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall in all subsequent proceedings be named as a party defendant to the action.

This Rule is copied from Reg. Gen., Hil. T., 1853, Rule 113, with the addition of the words at the end, "and shall in all subsequent proceedings be named as a party defendant to the action." A form of notice of appearance by a party not named in the writ will be found in Chitty's "Forms."*

See the note to Rule 18, *supra*.

Rule 21.

Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his Memorandum of Appearance or in a notice intituled in the cause, and signed by him or his solicitor; such notice to be served within four days after appearance; and an appearance where the defence is not so limited shall be deemed an appearance to defend for the whole.

This Rule is copied from section 174 of the Common Law Procedure Act, 1852, with the addition of the words, "in his Memorandum of Appearance."

As to the form of the notice, see the next section.

See the note to Rule 11, *supra*, and Order XIII., Rule 7, *infra*.

Rule 22.

The notice mentioned in the last preceding Rule may

Order XII.,
Rule 22.

be in the Form No 7 in Part I. of Appendix (A) hereto,* with such variations as circumstances may require.

A form of notice in this case is given in Chitty's "Forms," p. 537.
See the note to Rule 18, *supra*, and Order XIII., Rule 7, *infra*.

ORDER XIII.

DEFAULT OF APPEARANCE.

Rule 1.

Where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind not so found by inquisition, the plaintiff may apply to the Court or a Judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application was after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling house of the father or guardian, if any, of such infant, unless the Court or Judge at the time of hearing such application shall dispense with such last-mentioned service.

This Rule is copied, *mutatis mutandis*, from Order VII., Rule 3, of the Consolidated Orders of the Court of Chancery. There are, however, two important alterations. One is the substitution of "some proper person" for "one of the solicitors of the Court." In the Court of Chancery the

* The form in Appendix (A) contemplates the possibility of the action of ejectment being brought in *Chancery*.

Solicitor to the Suitors' Fund was generally appointed.* But where the application was made by the defendant's family, any suitable person might be appointed.† The other is that persons "of weak mind" are omitted. The practice under this Rule only applies to persons "of unsound mind." In the Court of Chancery persons of great age and incapable of giving a continuous attention to business, have been ordered to be defended by guardian *ad litem*.‡ The application in the Court of Chancery was by motion, and the order might have been obtained of course.§ Where the guardian dies, a special application for the appointment of a new one becomes necessary.||

Order XIII.,
Rule 1.

As to what is sufficient service on an infant, or a person of unsound mind not so found by inquisition, see Order IX., Rules 4 and 5, *supra*, and the notes thereto.¶

Forms of affidavit in support of the motion will be found in the "Forms" accompanying Daniel's "Chancery Practice," Nos. 119 and 135.

Rule 2.

Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance under any of the following Rules of this Order, or under Order XV., Rule 1, he shall, before taking such proceedings upon default, file an affidavit of service, or of notice in lieu of service, as the case may be.

This Rule is founded upon the provisions of sections 27 and 28 of the Common Law Procedure Act, 1852, but in the case of a writ specially indorsed, execution can be issued at once, without waiting eight days. Forms of the affidavit required by this Rule will be found in Chitty's "Forms," pp. 60, 69, and 70.**

As to Order XV., Rule 1, see that Rule, *infra*.

"Notice in lieu of service" is adapted to the case of a foreigner resident out of the jurisdiction.††

* *McKerrakin v. Cort*, 7 Beav., 347; *Thomas v. Thomas*, 7 Beav., 47; *Biddulph v. Camoys*, 9 Beav., 548.

† *Charlton v. West*, 3 D. F. J., 156; and see *Moore v. Platel*, 7 Beav., 583; and *Biddulph v. Dayrell*, 15 L. J. (Ch.), 320.

‡ *Newman v. Selfe*, 11 W. R., 764; *Steel v. Cobb*, 11 W. R., 298.

§ *Re Barrington*, 27 Beav., 272.

|| *Needham v. Smith*, 6 Beav., 130.

¶ See also Morgan & Chute's Chancery Acts and Orders, 4th Edn., pp. 400-402; Daniel's Chancery Practice, pp. 147, 160.

** The Forms at pp. 69 and 70 are for leave "to proceed;" but they can easily be adapted to proceedings in default of appearance.

†† Common Law Procedure Act, 1852, s. 19.

Order XIII.,
Rule 3.*Rule 3.*

In case of non-appearance by the defendant where the writ of summons is specially indorsed, under Order III., Rule 6, the plaintiff may sign final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs,* but it shall be lawful for the Court or a Judge to set aside or vary such judgment upon such terms as may seem just.

This Rule is a re-enactment of the second part of Rule 7 of the Principal Act, with the addition of the words, "under Order III., Rule 6."

The Rule is copied from the 27th section of the Common Law Procedure Act, 1852, and is founded on the recommendations of the Judicature Commission. (See the note to Order III., Rule 6, *supra*.)

It will be perceived that no mention is made of any proof of the amount of the debt upon a writ of inquiry or before one of the Masters, in the case of a defendant resident out of the jurisdiction, as exacted by sections 18 and 19 of the Common Law Procedure Act.

As to the mode of proceeding when the defendant appears, see Order XIV., *infra*.

Rule 4.

Where there are several defendants to a writ specially indorsed for a debt or liquidated demand for money, under Order III., Rule 6, and one or more of them appear to the writ, and another or others of them do not appear, the plaintiff may enter final judgment against such as have not appeared, and may issue execution upon such judgment without prejudice to his right to proceed with his action against such as have appeared.

This Rule is taken from section 33 of the Common Law Procedure Act, 1852, with this important alteration, that the claim of the plaintiff is treated as joint *and several*, and, consequently, his claim against the defendant who has appeared is not in any way prejudiced by his entering final judgment against the defendant who has not appeared, and issuing execution thereupon.

Under the old practice, the plaintiff, if he signed judgment against the defendant who had not appeared, and issued execution upon such judg-

* Under the old practice the amount which might be indorsed for costs, in this case, was fixed by Rule 1 of Reg. Gen., Hil. T., 1853. This would seem to be repealed by App. (D), Form 1, *infra*.

ment, was to be taken to have abandoned his action against the defendant (or defendants) who had appeared. The alternative formerly presented by section 33 of the Common Law Procedure Act, 1852,* to a plaintiff suing for a debt several defendants, one or more of whom did not appear, was not an inviting one.

Order XIII.,
Rule 4.

Rule 5.

Where the defendant fails to appear to the writ of summons, and the writ is not specially indorsed, but the plaintiff's claim is for a debt or liquidated demand only, no statement of claim need be delivered, but the plaintiff may file an affidavit of service or notice in lieu of service, as the case may be, and a statement of the particulars of his claim in respect of the causes of action stated in the indorsement upon the writ, and may, after the expiration of eight days, enter final judgment for the amount shown thereby and costs to be taxed, provided that the amount shall not be more than the sum indorsed upon the writ besides costs.

This Rule is a considerable improvement on section 28 of the Common Law Procedure Act, 1852, for which it is, *pro tanto*, substituted. That enactment required that a declaration should in this case be filed, and it was only in the event of no plea being pleaded to it within eight days that final judgment could be signed. No statement of claim (declaration) need now be delivered.

It will be perceived that this Rule only applies when the plaintiff's demand is for a *debt or liquidated demand in money* only, the writ not being specially indorsed. The next Rule applies to a case where the plaintiff's claim is for detention of goods and pecuniary damages, or either of them: in which case, of course, the writ cannot be specially indorsed.†

"A statement of the particulars of claim." This statement, it is apprehended, will be similar to the one which might have been *specially* indorsed on the writ; as to the form of which, see Appendix (A), Part II., section 7, *infra*.

"After the expiration of eight days"—i.e., from the date of the filing of the affidavit of service and statement of particulars. Under the old practice, the eight days ran from the time of filing a declaration; and

* See the note to that section in Day's Common Law Procedure Acts, pp. 69, 70.

† By section 93 of the Common Law Procedure Act, 1852, "in actions where the plaintiff seeks to recover a debt or liquidated demand in money, judgment by default shall be final."

**Order XIII.
Rule 5.**

if the defendant pleaded within these eight days, final judgment could not have been signed.

"The amount shewn thereby,"—i.e., by the particulars contained in the statement. Under the old practice the plaintiff signed final judgment for "an amount not exceeding the amount indorsed on the writ of summons, with interest at the rate specified, if any."* A similar limitation is imposed in the present Rule.

"The amount shall not be more than the sum indorsed upon the writ." It will be perceived that the words, "with interest at the rate specified," are omitted. The reason of this omission probably is that the money claim, where the writ is indorsed with the amount, but not specially indorsed with the particulars of the claim, is much more fully set out under the new practice than under the old, interest being specified where any is alleged to be due.† (See the forms, Appendix (A), Part II., section 2, *infra*.)

In the case of *The "Polymede"*‡ Sir Robert Phillimore decided that, although the 10th Rule of this Order had been annulled by the Rules of the Supreme Court, December, 1875, the present Rule did not thereby become applicable to proceedings in default of appearance in an Admiralty action *in rem*. The old practice under the Admiralty Rules of 1871 thereby revived.

"Costs to be taxed." Under the section just referred to, the costs were only to be taxed when the plaintiff claimed more than "the sum fixed by the Masters for costs."

See, further, as to taxation of costs, the Rules of the Supreme Court (Costs), *infra*.

In a case at chambers, Mr. Justice Quain decided that a plaintiff before signing judgment under the present Rule, must take out a summons.§

Rule 5a.

Where a defendant fails to appear to a writ of summons, issued out of a District Registry, and the defendant had the option of entering an appearance either in the District Registry or in the London office, judgment for want of appearance shall not be entered by the plaintiff until after such time as a letter posted in London on the previous evening, in due time for delivery to him on the following morning, ought, in due course of post, to have reached him.

* Common Law Procedure Act, 1852, section 28.

† Still it is to be observed that the interest is to be expressly added by Rule 3, where the writ is *specially* indorsed, although the particulars there are still more full.

‡ 1 P. D., 121; 34 L. T., 367; 24 W. R., 256; 2 Charley's Cases (Court), 156.

§ *Fowler v. Levy*, 1 Charley's Cases (Chambers), 43.

This new rule was added by the 7th Rule of the Rules of the Supreme Court, December, 1875.

Order XIII.,
Rule 5a.

As to the option of entering an appearance either in the District Registry or in London, see Order V., Rule 2, and Order XII., Rules 3, 6, and 6a, and the notes to those Rules, *supra*.

Rule 6.

Where the defendant fails to appear to the writ of summons, and the plaintiff's claim is not for a debt or liquidated demand only, but for detention of goods and pecuniary damages, or either of them, no statement of claim need be delivered, but interlocutory judgment may be entered and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons. But the Court or a Judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way in which any question arising in an action may be tried.

Where the plaintiff is entitled to enter interlocutory judgment under this Rule, and the writ of summons issues out of a District Registry, such interlocutory judgment (and, when damages have been assessed, final judgment) is to be entered in the District Registry, unless the Court or a Judge shall otherwise order. Order XXXV., Rule 1a, *infra*.

"No statement of claim need be delivered." See section 28 of the Common Law Procedure Act, which required in this case, as in the case of a debt or liquidated demand, that "*a declaration should be filed*." (See the note to the last Rule.) Interlocutory judgment can now be at once signed upon default of appearance.

Where the judgment is "interlocutory" merely—*i.e.*, for unliquidated damages—the plaintiff's title to damages is thereby established; but *the amount* of them yet remains to be ascertained. Under the old practice, this was done by a reference to the Master, or by means of a writ of inquiry.*

A reference to a Master was a more expeditious and less expensive mode of proceeding than executing a writ of enquiry. The Court was in the habit of referring it to the Master to compute damages, where the damages were a mere matter of calculation of figures, even before the Common Law Procedure Act, 1852, and by the 94th section of that Act the legislature expressly sanctioned references to the Master in cases where the amount of damages was "*substantially a matter of calculation*." The writ of inquiry is usually executed before the Sheriff or his deputy, who

* Archbold's Practice, p. 990.

**Order XLII.,
Rule 6.**

in London is the Secondary. The inquest is taken nearly in the same manner as at a trial at Nisi Prius. All the plaintiff, however, has to prove, is *the quantum* of the damages,* and the defendant, therefore, cannot go into any evidence of matter tantamount to a defence of the action or any part of it, and which he might have pleaded.† Though he brings forward no evidence at all in support of his claim, the plaintiff must have nominal damages, at least, given him by the inquest. The writ is issued, as of course, without obtaining any order of the Court for the purpose, except when it is to be executed before a Judge.

In the case of a reference to the Master, an order of the Court or a Judge is necessary. It is apprehended that the present Rule is not intended to interfere with the previous practice of referring the question of the *quantum* of damages to the Master. The powers of Masters under the new practice are defined in Order LIV., *infra*.

Where the action proceeds in a District Registry, the reference, it is apprehended, would be to the District Registrars, who are armed with all the powers of Masters.‡

The present Rule says, that "the Court or a Judge may order that the damages shall be ascertained in any way in which any question arising in an action may be tried." By s. 57 of the Principal Act, *supra*, "the Court or a Judge may, in any cause or manner, order any question arising therein to be tried either before an Official or before a Special Referee."

The indorsement of claim will be a sufficient guide to the person conducting the inquiry, without a declaration.

In an action for rent, and for the return of specific goods, Mr. Justice Quain, at chambers,§ held that the last words of this Rule apply to the old writ of delivery when the value of the goods would have to be assessed, and that the plaintiff might sign judgment for the return of the specific goods retained, and proceed to execution under Rule 4 of Order XLII.

In an action for damages on the policy of insurance of a ship, inspection of a ship's papers was allowed before appearance, because the plaintiff had power to sign judgment in case of default of appearance, under the present Rule. Per Lush, J.||

Rule 7.

In case no appearance shall be entered in an action for the recovery of land, within the time limited for appearance, or if an appearance be entered, but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply.

The Rule is copied from s. 177 of the Common Law Procedure Act, 1852. See Order XII., Rules 21 and 22, *supra*.

* *De Gaillon v. L'Aigle*, 1 B. and P., 368.

† *Speck v. Phillips*, 6 M. and W., 279.

‡ See Order XXXV., Rule 4, *infra*.

§ *Ivory v. Cruikshank the Younger*, 1 Charley's Cases (Court), 123.

|| 1 Charley's Cases (Chambers), 43.

Rule 8.

Order XIII.,
Rule 8.

Where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, upon a writ for the recovery of land, he may enter judgment as in the last preceding Rule mentioned for the land, and may proceed as in the other preceding Rules of this Order as to such other claim so indorsed.

See as to this Rule s. 214 of the Common Law Procedure Act, 1852, and Order XVII., Rule 2, *infra*.

Under the old practice it was sometimes more prudent not to proceed for mesne profits, when the defendant did not appear.*

Rule 9.

In actions assigned by the 34th section of the Act to the Chancery Division, and in Probate actions, and in all other actions not by the Rules in this Order otherwise specially provided for, in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service the action may proceed as if such party had appeared.

In the Court of Chancery the practice has been† for the *plaintiff to enter an appearance for the defendant*, when the latter has made default in appearance. In the Court of Probate the practice has been to proceed *without any defendant*, when the defendant makes default in appearance.‡

In the case of *The Provident Permanent Building Society v. Greenhill*,§ the Master of the Rolls directed that the suit, which was commenced before the 1st of November, 1875, and in which a defendant, who had been served with a copy of the Bill under the old practice, had failed to appear, should proceed under the new practice, in order that the plaintiff might obtain the benefit of the present Rule.

Similar leave was given in the case of *Gardiner v. Hardy*,|| which was a foreclosure suit commenced before the 1st of November, 1875, against defendants out of the jurisdiction, and in which the defendants, who had

* Day's Common Law Procedure Acts, p. 210, 4th ed. (1872).

† Rules 3, 4 and 7 of Order X. of the Consolidated Orders of the Court of Chancery.

‡ Cooto and Tristram's Probate Practice, p. 565.

§ 1 Ch. D., 624; 45 L. J. (Ch.), 272. || W. N., 1876, p. 153.

Order XIII., been served in New Zealand with a copy of the Bill, had failed to appear.
Rule 9. Vice-Chancellor Bacon at first acceded to the plaintiff's application for liberty to file a traversing note, but the Registrar objected to draw up the part of the order, which gave leave to file a traversing note, on the ground that it was no longer the practice; and on a second application on behalf of the plaintiff, the Vice-Chancellor followed the precedent of *The Provident Permanent Building Society v. Greenhill*, and gave leave to proceed under the new practice without giving leave to file a traversing note.*

No order seems to be necessary under this Rule, in an action, commenced in a District Registry, for a dissolution of partnership in which no appearance has been entered, that the papers may be sent up to London for the hearing. The papers would be sent up, as a matter of course, when the action was set down in the District Registry on motion for judgment in London.†

This Rule does not enable a plaintiff to sign judgment, in default of defence, under Order XXIX., Rule 10, without delivering a statement of claim.‡

"Upon the filing of a proper affidavit of service." In *Shepherd v. Beane*§ the plaintiff, in default of appearance, filed not only "a proper affidavit of service," but also the statement of claim, the notice of motion for a receiver, the affidavit in support of that motion, and a notice of filing it. As this was the first case under the present Rule, the Record and Writ Clerks felt some difficulty as to what was the proper practice under it with regard to filing documents. Vice-Chancellor Bacon approved of the course taken by the plaintiff, on account of the language of Order XIX., Rule 6, which directs that "*every pleading or other document required to be delivered to a party shall, if no appearance has been entered for any party, be delivered by being filed with the proper officer.*"

Rule 10.

In an Admiralty action in rem, in which an appearance has not been entered, the plaintiff may proceed as follows:—

(a.) *He may, after the expiration of twelve days from the filing of the writ of summons, take out a notice of sale, to be advertised by him in two or more public journals to be from time to time appointed by the Judge.*

(b.) *After the expiration of six days from the advertisement of the notice of sale in the said journals, if an appearance has not been entered, the plaintiff shall file in the Registry an affidavit to the effect that the said notices have been duly advertised, with copies of the journals annexed, as also such proofs as may be necessary to establish the claim, and a notice of motion to have the property sold.*

(c.) *If, when the motion comes before the Judge, he is satisfied that*

* W. N. 1876, p. 185.

+ *Lumb v. Whiteley*, W. N., 1877, p. 40.

‡ *Minton v. Metcalf*, 36 L. T., 683; 12 N. C., 133.

§ W. N., 1876, p. 61.

the claim is well founded, he may order the property to be appraised and sold, and the proceeds to be paid into the Registry.

**Order XIII.,
Rule 10.**

(d.) If there be two or more actions by default pending against the same property, it shall not be necessary to take out a notice of sale in more than one of the actions ; but if the plaintiff in the first action does not, within eighteen days from the filing of the writ in that action, take out and advertise the notice of sale, the plaintiff in the second or any subsequent action may take out and advertise the notice of sale, if he shall have filed in the Registry a writ of summons in rem in such second or subsequent action.

(e.) Within six days from the time when the proceeds have been paid into the Registry, the plaintiff in each action shall, if he has not previously done so, file his proofs in the Registry, and have the action placed on the list for hearing.

(f.) In an action of possession, after the expiration of six days from the filing of the writ, if an appearance has not been entered, the plaintiff may, on filing in the Registry a memorandum, take out a notice of proceeding in the action, to be advertised by him in two or more public journals to be from time to time appointed by the Judge.

(g.) After the expiration of six days from the advertisement of the notice of proceeding in the said journals, if an appearance has not been entered, the plaintiff shall file in the Registry an affidavit to the effect that the notice has been duly advertised, with copies of the journals annexed, as also such proof as may be necessary to establish the action and shall have the action placed on the list for hearing.

(h.) If, when the action comes before the Judge, he is satisfied that the claim is well founded, he may pronounce for the same, and decree possession of the vessel accordingly.

This Rule was copied *verbatim* from the Rules, Orders and Regulations of the High Court of Admiralty, made on the 29th of November, 1859, in pursuance of the provisions of the 3 and 4 Vict. cc. 65 and 66, and 17 and 18 Vict. c. 78, Rules 18 to 26.*

The Rule was annulled by the 8th Rule of the Rules of the Supreme Court, December, 1875, inserted, *infra*, as Rule 10a of this Order.

As to the effect of the abrogation of this Rule, see the note to Rule 10a, *infra*.

Rule 10a.

Order XIII., Rule 10, of the Rules of the Supreme Court, is hereby annulled.

* See them in the Appendix to Williams and Bruce's Admiralty Practice, pp. xxxi., xxxii. The only alteration is the substitution of the plaintiff for his "proctor."

**Order XIII.,
Rule 10a.**

This new Rule was added by the 8th Rule of the Rules of the Supreme Court, December, 1875.

The effect of the new Rule is to revive the practice existing in the High Court of Admiralty, with regard to proceedings in default in causes *in rem*, immediately prior to the commencement of the present Act.*

That practice is contained in Rules 4 and 5 of the Additional Rules of the High Court of Admiralty, 1871.

ORDER XIV.

LEAVE TO DEFEND WHERE WRIT SPECIALLY INDORSED.

Rule 1.

Where the defendant appears on a writ of summons specially indorsed, under Order III., Rule 6, the plaintiff may, on affidavit verifying the cause of action, and swearing that in his belief there is no defence to the action, call on the defendant to show cause before the Court or a Judge why the plaintiff should not be at liberty to sign final judgment for the amount so endorsed, together with interest, if any, and costs; and the Court or Judge may, unless the defendant, by affidavit or otherwise, satisfy the Court or Judge that he has a good defence to the action on the merits, or disclose such facts as the Court or Judge may think sufficient to entitle him to be permitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly.

This Rule was annulled by Rule 1a of this Order (Rule 3 of the Rules of the Supreme Court, May, 1877), *infra*. See the note to that Rule, *infra*.

Rule 1a.

Order XIV., Rule 1, of the Rules of the Supreme Court, is hereby repealed, and the following Rule is substituted:—

Where the defendant appears to a writ of summons specially indorsed under Order III., Rule 6, the plaintiff may, on affidavit made by himself, OR BY ANY OTHER PERSON WHO CAN SWEAR POSITIVELY TO THE DEBT OR CAUSE OF ACTION, verifying the cause of action, and stating that in his belief there is no defence to the action, call on

* *The "Polymede,"* 1 P. D., 121; 34 L. T., 867; 24 W. R., 256; Charley's Cases (Court), 156.

the defendant to show cause before the Court or a Judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. A COPY OF THE AFFIDAVIT SHALL ACCOMPANY THE SUMMONS OR NOTICE OF MOTION. The Court or a Judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the Court or a Judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to sign judgment accordingly.

Order XIV.,
Rule 1a.

This new Rule was added by Rule 3 of the Rules of the Supreme Court, May, 1877. The principal alterations effected by it are indicated by the small capitals.

Rule 1 of this Order was a re-enactment of the third part of Rule 7 of the Principal Act, with the addition of the words "under Order III., Rule 6," and the omission of the words at the end, "permission to defend the action may be granted to the defendant on such terms or conditions, if any, as the Judge or Court may think just." The omitted words appear as Rule 6 of this Order, *infra*.

See the cases cited under Order III., Rule 6, *supra*.

As to the time within which the defendant is to deliver his defence, where he is permitted to defend the action under this Rule, see Order XXII., Rule 3, *infra*.

The present Order is an important improvement on section 27 of the Common Law Procedure Act, 1852. It is founded on the recommendation of the Judicature Commission,* cited under Order III., Rule 6, *supra*.

Where a new affidavit under Rule 1, was read before Mr. Justice Lindley, at chambers, he considered the case as substantially a new one, and not a case on appeal from the Master, which it otherwise purported to be.†

Mr. Justice Quain laid down, at chambers, that a defendant to a specially indorsed writ must show a good defence on the merits. An affidavit merely that he has a good defence is not sufficient.‡ But see *The Standard Discount Company, Limited v. De la Grange*,§ and *Lloyd's Banking Company v. Ogle*,|| epitomised under Order XIV., Rule 6, *infra*.

In the case of *Frederici v. Vandersee*,¶ it was decided by the Common Pleas Division, overruling a decision of Mr. Justice Lush at chambers,

* First Report, p. 11.

† 1 Charley's Cases (Chambers), 52.

‡ 1 Charley's Cases (Chambers), 48.

§ *Times*, Thursday, August 10th, 1876.

|| 1 Ex. D., 262; 45 L. J. (Ex.), 606; 34 L. T., 584; 24 W. R., 678.

¶ 2 C. P. D., 70; 46 L. J. (C. P.), 194; 35 L. T., 844, 889; 25 W. R., 389.

Order XIV.,
Rule 1a.

that the affidavit verifying the cause of action and swearing that in the plaintiff's belief there is no defence to the action, must be sworn by the plaintiff himself; and that an affidavit by the plaintiff's solicitor verifying the cause of action, and swearing that in the solicitor's belief there was no defence to the action, was insufficient. The Court of Appeal affirmed the decision of the Common Pleas Division. In *The Bank of Montreal v. Cameron*,* the Court of Appeal, affirming the decision of the Queen's Bench Division, held that corporations were from the wording of Rule 1, *supra*, excluded from the benefits of this Rule, as the officers could not make the affidavit. In the case of *Frederici v. Vandersee* the decision rendered it necessary to send out to Smyrna, where the plaintiff resided, to have the affidavit sworn. This, Mr. Justice Grove said, might "cause inconvenience;" and accordingly the above new Rule 1a, provides a remedy for this "inconvenience."

All that the Judge requires to see under Order XIV., Rule 1, is that there is a *bond fide* defence. He does not pretend to try the action.†

Judgment was ordered by Quain, J., at chambers, to be signed on a specially indorsed writ, in an action by a Company for a balance due to them by a firm of solicitors, instructed to collect the debts of the Company, one of whom had allowed judgment to go by default, while the other had expressed his willingness to pay his moiety, if the Company would undertake not to levy execution upon him for the whole.‡

Judgment was ordered to be signed on a specially indorsed writ, although the defendant was then at sea, he having been served the day before he sailed.§

Where, in an action on a bill of exchange against executors, the defendant claimed an administration order as next of kin, Lindley, J., at chambers, made the order, and transferred the action to the Chancery Division.||

Leave was given to sign judgment on a specially indorsed writ, in an action for commission by a stockbroker, although the correctness of his account was disputed by the defendant.¶

Leave was given to sign judgment on a specially indorsed writ, in an action for the hire of a steam pump, although the defendant alleged that the pump was insufficient for the purpose for which it was hired.**

Leave was given to sign judgment on a specially indorsed writ, in an action for money paid for differences on the Stock Exchange, although the defendant alleged that there was an agreement (without consideration) to carry over the account.††

Leave was given to sign judgment on a specially indorsed writ, in an action on a guarantee, although the defendant swore that the guarantee was given under protest, and obtained by undue pressure.‡‡

In an action for milk sold and delivered where the writ was specially indorsed, a counterclaim was made for breach of contract in not supply-

* 25 W. R., 593; 36 L. T., 416; 2 Q. B. D., 536.

† *Andrews v. Stewart*, 1 Charley's Cases (Chambers), 50.

‡ *East Assam Company, Limited v. Roche and Gover*, 1 Charley's Cases (Chambers), 46.

§ 1 Charley's Cases (Chambers), 49.

|| 1 Charley's Cases (Chambers), 52.

¶ 2 Charley's Cases (Chambers), 18.

** *Phillips v. Harris*, 2 Charley's Cases (Chambers), 20.

†† *Woolston v. Baines*, 2 Charley's Cases (Chambers), 21.

‡‡ 2 Charley's Cases (Chambers), 22.

ing a sufficient quantity of the milk; the defendant was admitted to defend, confining his defence to his counterclaim.* Order XIV.,
Rule 1a.

The Judge refused to order judgment to be signed on a specially indorsed writ, in an action for arrears of salary, where the plaintiff's affidavit was sworn to be untrue, and where, in point of fact, the services for which a salary was claimed, had never been performed.†

Leave to sign judgment on a specially indorsed writ was refused, the defendant, served in New York (on the 5th of January), not having had time to instruct his solicitors before the summons was taken out (on January 7th).‡

Leave to sign judgment on a specially indorsed writ was refused, in an action of covenant, in which the defendant pleaded a deed of release, and the plaintiff replied that the alleged deed was an escrow.§

Where the Master has indorsed "No order," on an application for leave to sign judgment on a specially indorsed writ, this is equivalent to leave to defend, and if the defendant does not deliver his defence within eight days, under Order XXII., Rule 3, the plaintiff may then sign judgment.||

Where the writ has been specially indorsed, the defendant must deliver a statement of defence under Order XXII., Rule 3, otherwise the plaintiff will be entitled to sign judgment under Order XXIX., Rule 2, although he has delivered no notice pursuant to Order XXI., Rule 4.¶

Rule 2.

The application by the plaintiff for leave to enter final judgment under the last preceding Rule shall be made by summons returnable not less than two clear days after service.

The Judicature Commission recommended ** that the plaintiff should "take out a summons" in this case.

As to the practice, see Coe's Practice of the Judges' Chambers, pp. 51—57.

Rule 3.

The defendant may show cause against such application by offering to bring into Court the sum indorsed on the writ, or by affidavit. In such affidavit he shall state

* 1 Charley's Cases (Chambers), 45.

† *Ameuny v. His Highness the Nawab Nizam of Bengal*, 1 Charley's Cases (Chambers), 47.

‡ 2 Charley's Cases (Chambers) 18.

§ *Berridge v. Roberts*, 2 Charley's Cases (Chambers), 21

|| *The Margate Pier and Harbour Company v. Perry*, 2 Charley's Cases (Chambers), 19.

¶ *Atkins v. Taylor*, 1 Charley's Cases (Chambers), 53.

** First Report, p. 11.

Order XIV.,
Rule 3.

whether the defence he alleges goes to the whole or to part only, and if so, to what part, of the plaintiff's claim. And the Judge may, if he think fit, order the defendant to attend and be examined upon oath; or to produce any books or documents or copies of or extracts therefrom.

In this and the following Rules, the details of the recommendation of the Judicature Commission (cited under Order III., Rule 6), have been very carefully worked out.

A speedy remedy against defendants, who seek to defeat by delay their creditors, is now available, in the case of liquidated demands specially indorsed.

"Bring into Court the sum indorsed on the writ." See *Runnacles v. Mesquita*,* and *Lloyd's Banking Company v. Ogle*,† cited under Rule 6 of his Order, *infra*.

The "affidavit" mentioned in this Rule must be sworn by the defendant himself; see per Baggallay and Brett, L.JJ., in *Frederici v. Vandersee*.‡

Where the affidavit of the plaintiff for leave to sign judgment under this Rule is answered by an affidavit of the defendant, an affidavit in reply to the defendant's answer will be allowed to be filed by the plaintiff. This was so decided by the Common Pleas Division on appeal from Mr. Justice Lush, at chambers, who had allowed the affidavit in reply to be filed.§

Rule 4.

If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted to be due, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted to be due, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise, as the Judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim.

See the note to Rule 3 of this Order, *supra*.

* 1 Q. B. D., 416; 45 L. J. (Q. B.), 407; 24 W. R., 553.

† 1 Ex. D., 262; 45 L. J. (Ex.), 606; 34 L. T., 584; 24 W. R., 678.]

‡ 2 C. P. D., 70; 46 L. J. (C. P.), 194; 35 L. T., 844, 889; 25 W. R., 389.

§ *Davis v. Spence*, 1 C. P. D., 719; 25 W. R., 229.

Leave was given, at chambers, to sign judgment on a specially indorsed writ for a part of the claim admitted by the defendant, unless paid within a week.*

**Order XIV.,
Rule 4.**

In an action for use and occupation and for rent, in the alternative, the defendant admitting that he had been in possession for more than a year, leave was given by Archibald, J., at chambers, to sign judgment for arrears of rent during that part of the time.† From this decision the defendant appealed to the Common Pleas Division, but the Court (Brett, Archibald, and Lindley, JJ.) dismissed the appeal with costs.‡ “When a man clearly has an undoubted right,” said Mr. Justice Brett, “to recover money in *some* form of action, he may at once sign judgment for the amount without staying to determine in *what precise* form of action he is entitled to recover.” The Court of Appeal, however, reversed the decision of the Common Pleas Division.§

Rule 5.

If it appears to the Judge that any defendant has a good defence to, or ought to be permitted to defend, the action, and that any other defendant has not such defence, and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment, without prejudice to his right to proceed with his action against the former.

See Order XIII., Rule 4, *supra*, where the same principle is adopted. See also s. 33 of the Common Law Procedure Act, 1852.

Rule 6.

Leave to defend may be given unconditionally, or subject to such terms as to giving security, or otherwise, as the Court or Judge may think fit.

This Rule is a re-enactment of the latter portion of the third part of Rule 7 of the Principal Act, omitted from Rule 1 of this Order, *supra*.

“Leave to defend,” i.e., under the circumstances mentioned in the previous Rule of this Order.

Where the writ is specially indorsed, and the defendant in his affidavit goes beyond the bare statement that he has a defence on the merits, and shews what the grounds of his defence are, and gives reasons from which the Court may fairly conclude that the defence is a *substantial* one, the defendant ought not to be required to pay money into Court as a condition precedent to his being admitted to defend.||

* 2 Charley's Cases (Chambers), 22.

† *Lord Hanmer v. Flight*, 2 Charley's Cases (Chambers), 23.

‡ *Lord Hanmer v. Flight*, 35 L. T., 127; 24 W. R., 346.

§ 36 L. T., 279.

|| *Runnacles v. Mesquita*, 1 Q. B. D., 416; 45 L. J. (Q. B.), 407; 24 W. R., 553.

**Order XIV.,
Rule 6.**

In *Lloyd's Banking Company v. Ogle*,* the writ of summons was specially indorsed under the present Rule as follows:—"The plaintiff's claim is for £6,000 and interest, under a continuing guarantee not to exceed £6,000 and interest thereon at 5 per cent. per annum for the banking account of the Hockley Hall Collieries (Limited) with the plaintiffs." The defendant, in his affidavit, in reply to the plaintiff's application for liberty to sign final judgment against the defendant, deposed that he was no longer a director of the Hockley Hall Collieries Company, and that he verily believed that nothing at all was due to the plaintiff Company by virtue of the guarantee. The Exchequer Division† let the defendant in to defend, without obliging him to bring the money into Court or to give security for it, the defendant as guarantor having made no acknowledgment of the alleged debt, and required it to be proved.

Judgment was ordered, at chambers, to be signed on a specially indorsed writ in an action on a bill of exchange by the indorsees against the acceptors, unless the defendants paid the amount into Court in ten days, although the defendants claimed indemnity from the drawer and wanted to bring him as a third party.‡

Judgment was ordered by Lindley, J., at chambers, to be signed on a specially indorsed writ in an action brought to recover money on behalf of an administration estate, unless the defendant paid the amount into Court, where the defendants desired to set up a counterclaim for costs in a Chancery suit, which might never become due.§

ORDER XV.

**APPLICATION FOR ACCOUNT WHERE WRIT INDORSED
UNDER ORDER III., RULE 8.**

Rule 1.

In default of appearance to a summons indorsed under Order III., Rule 8, and after appearance, unless the defendant by affidavit or otherwise satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the account claimed, with all directions now usual in the Court of Chancery in similar cases, shall be forthwith made.

This Rule is a re-enactment of the second part of Rule 8 of the Principal Act, "to a summons indorsed under Order III., Rule 8," being substituted for "on such summons," in order to adapt the Rule to the present Act.

By Order XIII., Rule 2, the plaintiff must, before taking any proceeding upon default under the present Rule, file an affidavit of service, or

* 1 Ex. D., 262; 45 L. J. (Ex.), 606; 34 L. T., 584; 24 W. R., 678.

† Bramwell and Cleasby, BB.

‡ *The German Bank of London, Limited v. Schmidt & Company*, 1 Charley's Cases (Chambers), 53.

§ *Roberts v. Guest*, 1 Charley's Cases (Chambers), 53.

of notice in lieu of service, as the case may be. See Rule 2 of this Order, as to the necessity also for an affidavit of grounds of claim for account.

**Order XV.,
Rule 1.**

This Rule is copied from the recommendations of the Judicature Commission* :—" In cases of ordinary account, as in cases of a partnership or executorship or ordinary trust account, when nothing more is required, in the first instance, than an account, the writ should be specially endorsed, and in default of appearance or after appearance, unless the defendant shall satisfy a Judge that there is really some preliminary question to be tried, an order for the account with all usual directions should be made forthwith."

As to the general power of directing inquiries and accounts at any stage in a cause possessed by the Court or a Judge, see Order XXXIII., *infra*.

An order for an account under the present Rule cannot be enforced by an attachment under Order XXXI., Rule 20, which applies only to failure "to comply with any order to answer interrogatories, or for discovery or inspection of documents."†

It is only in default of appearance that a District Registrar can make an order for an account under this Rule. The order of the Court, or of a Judge, under s. 66 of the Supreme Court of Judicature Act, 1873, is in all other cases necessary to put the District Registrar in motion before accounts and inquiries can be prosecuted in a District Registry.‡

Rule 2.

An application for such order as [mentioned in the last preceding Rule shall be made by summons, and be supported by an affidavit filed on behalf of the plaintiff stating concisely the grounds of his claim to an account. The application may be made at any time after the time for entering an appearance has expired.

"The application shall be made by summons," as under Order XIV., Rule 2, *supra*.

An affidavit of service or of notice in lieu of service is also necessary. Order XIII., Rule 2.

Proceedings were stayed on a summons at chambers by Quain, J., in an action at law, pending an administration suit, although the plaintiff had obtained an order for an executor's account in the action at law, under the present Order, the writ in that action having been indorsed under Order III., Rule 8. "This," said Mr Justice Quain, "is one of the cases intended by the new Acts; the order for account is the same as the old decree."§

* First Report, p. 11.

† *Pike v. Keene*, 35 L. T., 341; 24 W. R., 322; W. N., 1876, p. 36.

‡ *Irlam v. Irlam*, 2 Ch. D., 608; 24 W. R., 292.

§ *Bell v. Lowe and others (Executors)*, 1 Charley's Cases (Chambers), 56.

Order XVI.,
Rule 1.

ORDER XVI.

PARTIES.

Rule 1.

All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the Court in disposing of the costs of the action shall otherwise direct.

This Rule is taken from section 19 of the Common Law Procedure Act, 1860, which Mr Day has pronounced* to be "a very valuable enactment."

The Common Law Commissioners suggested that plaintiffs should be entrusted with the right of bringing their actions in the names of all the persons in whom the legal right might be supposed to exist, leaving it to the Court to give judgment in favour of the person or persons who might be found to be entitled to recover. The Legislature gave effect to this suggestion by enacting the 19th section of the Common Law Procedure Act, 1860. The old rule, requiring an action to be brought in the name only of the person in whom the right of action was vested, was thus abrogated.

The present Rule wisely retains the provision of s. 19 of the Common Law Procedure Act, 1860, as to extra costs needlessly occasioned to an unsuccessful defendant.

The law at the time of the passing of the Common Law Procedure Act, 1852, with reference to the mis-joinder and non-joinder of plaintiffs and defendants, is thus stated by the Common Law Commissioners:—†
"In actions on contract, the omission of a party as plaintiff who ought to be joined, or the joinder of a party who ought not to be joined, may be fatal to the action; so the joinder of a person as defendant, who ought not to be joined, is likewise fatal; whilst the omission of a party as defendant who ought to be joined can only be taken advantage of by a plea in abatement. In actions of tort the joinder of a party, who ought not to be plaintiff, is fatal; whilst the non-joinder of a party, who ought to be a co-plaintiff, can only be taken advantage of by a plea in abatement; and in such actions the joinder of persons, who are not

* Common Law Procedure Acts, p. 364.

† Third Report, p. 9.

liable as defendants, only entitles them to an acquittal; and the non-joinder of persons jointly liable is of no consequence."

Order XVI.,
Rule 1.

See the 34th and five following sections of the Common Law Procedure Act, 1852, and s. 24 of the Principal Act, *supra*.

When two or more plaintiffs sue for a *joint* claim, the defendant may set up one or more *separate* counterclaims against each of the plaintiffs. In an action by two railway companies as joint lessees of another railway for rent due by the defendant for the use of sidings on the third railway for his coal waggons, the defendant was allowed by the Exchequer Division (affirming the decision of Grove, J., at chambers) to set up two distinct counterclaims for damages for delay in delivering coals to the defendant at the station of the third railway, one counterclaim being against one of the plaintiff companies and the other against the other plaintiff company.*

Rule 2.

Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the Court or a Judge may, if satisfied that it has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as may seem just.

The method of striking out and adding names of plaintiffs is prescribed by Rule 13, *infra*.

This Rule, which applies to mistakes of law as well as of fact,† is intended to supplement the previous one. Mr. Day, in his preface,‡ observes upon the danger of a mistake as to the proper person to institute an action. "A mistake involves an expensive defeat" and great hardship."

By Rule 14 of this Order any application to substitute or add a plaintiff is to be by motion [in Court] or *summons* [at chambers], if made before trial. In the case of *Tildesley v. Harper*, § Vice-Chancellor Hall assented to an application *ex parte* at chambers to join three infant *cestuis que trustent* as plaintiffs by their next friend in an action for breach of trust, but his lordship declined to draw up the order on the application *ex parte*. He intimated that the plaintiff might give the defendants notice that an order had been made in these terms, and require them to state whether they objected to the order or desired notice, the Court being of opinion that they ought to have been served with notice of the application. If

* *Manchester, Sheffield and Lincolnshire Railway Company and London and North Western Railway Company v. Brooks*, 2 Ex. D., 243; 46 L. J. (Ex.), 244; 36 L. T., 103; 25 W. R., 413.

† *Duckett v. Gover*, 25 W. R., 445; W. N., 1877, p. 62.

‡ Pp. 4, 5.

§ 3 Ch. D., 277.

**Order XVI.,
Rule 2.**

they did not object, the order would be drawn up, as having been made upon motion. If they required to be served with notice, the Court, on the further application, would deal with the costs, which otherwise would be costs in the cause.

In an action to recover letters patent, the names of the alleged assignees of the patent from the plaintiff were ordered at chambers to be added, as co-plaintiffs, the original plaintiff still to give security for costs, as the assignment might prove to be invalid.* "You have to satisfy me," said Huddleston, B., "of two things under Order XVI., Rule 2—first, that there has been a *bona fide* mistake in the original issue of the writ; and, secondly, that it is a necessary change. The affidavit does not state that there has been a *bona fide* mistake; but I think that, looking at Rule 13 of the same Order, I can make this amendment. If these parties had been originally joined as plaintiffs in the action, they could not have been struck out."

A bank having brought an action for the balance due on a promissory note under the Summary Procedure on Bills of Exchange Act, 1855 (18 and 19 Vict. c. 67), an order was made at chambers substituting as plaintiff the person in whose favour the note was drawn, and who put the note in the hands of the bank, he having omitted to endorse it.† Mr. Justice Denman in this case overruled an objection that the new procedure did not apply to the action. See, as to this, *Oger v. Bradnum* ‡ cited under Order II., Rule 6, *supra*, and cases cited under Rules 3 and 13 of this Order, *infra*. As to what is, and is not, a "*bona fide* mistake," see *Clowes v. Hilliard*,§ and *Duckett v. Gover*.||

Rule 3.

All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

This Rule is new, but it is the logical sequence of the principles introduced, with regard to the joinder of plaintiffs, by the 19th section of the Common Law Procedure Act, 1860, and embodied in Rule 1 of this Order, *supra*.

The persons who, under the present Rule, might have been joined as defendants at the commencement of the action, may, "at any stage of the proceedings," be added under Rule 13 of this Order, at the instance of either party, or even without any application, by the Court or a Judge.¶

* *Smith v. Haseltine*, 1 Charley's Cases (Chambers), 56.

† *The Mercantile River Plate Bank v. Isaac*, 2 Charley's Cases (Chambers), 23.

‡ 1 C. P., 331; 45 L. J. (C.P.), 273; 34 L. T., 578; 24 W. R., 404; 2 Charley's Cases (Court), 132; at chambers, before Denman, J., 2 Charley's Cases (Chambers), 13.

§ 4 Ch. D., 413; 25 W. R., 224.

|| 25 W. R., 445.

¶ *Edwards v. Lowther*, 45 L. J. (C.P.), 417; 34 L. T., 255; 24 W. R., 434.

In *Evans v. Buck, Buck v. Evans*,* Jessel, M. R., held that a defendant had no right to join a third party as defendant to his counterclaim, against whom he sought relief in one only of two inconsistent alternatives.

Order XVI.,
Rule 3.

In *Child v. Stenning*,† however, the Court of Appeal (Jessel, M.R., presiding) held that a plaintiff might join as co-defendant to his claim a person against whom he claimed relief in one only of two inconsistent alternatives.

Rule 4.

It shall not be necessary that every defendant to any action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the Court or a Judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in such action in which he may have no interest.

This Rule is a re-enactment of Rule 23 of the Principal Act.

It embodies a principle well known and recognised in Courts of Equity, where the practice is to bring before the Court all parties whose appearance is necessary, in order to enable it to do complete justice, a practice which forms a distinguishing feature of the new system of judicature. See subsection (7) of section 24 of the Principal Act, *supra*, and s. 13 of this Order, *infra*.

The present Rule was interpreted by Vice-Chancellor Bacon, and the Court of Appeal, in a very liberal manner, in the case of *Cox v. Barker*.‡ By a marriage settlement real estate was limited to such uses as the husband and wife should appoint, and, in default, to the use of trustees during the life of the wife, in trust for her, for her separate use, with remainder to her husband in fee. The husband contracted to sell the property, the purchaser receiving notice of the provisions of the settlement. The purchase-money was paid to the trustees of the settlement, and a draft conveyance, containing an appointment by the husband and wife to the purchaser, was approved; but before the conveyance could be executed, the husband suddenly died, having, by his will dated before the contract, bequeathed the residue of his personal estate to trustees, upon trust to invest and pay the income to the plaintiff for her life, and after her death to pay the principal to certain charities, and devised all his real estate to trustees, in trust for the plaintiff for life, and, after her death upon trust to sell and divide the proceeds among the grandchildren of one of his relatives. The widow, who was executrix of the will, refused to complete the sale, on the ground that it would divert the real property from the grandchildren of the testator's relative to the charities; and she

* 4 Ch. D., 432; 46 L. J. (Ch.), 157; 25 W. R., 392.

† 36 L. T., 425; 25 W. R., 519. These apparently conflicting decisions may, perhaps, be reconciled on the ground that this Rule does not apply to counterclaims.

‡ *Cox v. Barker, Barker v. Cox*, 3 Ch. D., 359; 35 L. T., 622, 685.

**Order XVI.,
Rule 4.**

brought an action against the purchaser, the executors, and the devisees in trust under the will, and in her statement of claim sought to have the following questions determined by the Court:—Whether the contract for sale was binding on her—what was the true construction of it—whether, if the contract were completed by the trustees of the settlement as to the ultimate remainder only, the purchaser would be entitled to compensation out of the purchase-money, for the life-interest of the plaintiff—whether, if the contract was not binding as between the parties, it operated to convert the testator's ultimate remainder into personalty—whether, if so converted, the property was pure personalty or savoured of the realty—whether the plaintiff could be compelled to concur in the conveyance to the purchaser—whether her concurrence, if she were so compellable, would alter the ultimate destination of the testator's interest in the property—and whether any trusts of the testator's interest or of the proceeds of the sale were validly declared by the testator in his lifetime. To the whole of the statement of claim the defendant demurred, on the ground that the facts alleged in it did not show any cause of action to which effect could be given by the Court against him. The Court, it was argued, by counsel for the defendant, would not entertain an action which sought to obtain a mere abstract expression of opinion on matters affecting the interests of persons under the will. The only question, it was argued, raised by the statement of claim, in which the defendant was interested, were, first, the validity of the contract for sale, and, secondly, how far it was binding. Counsell for the plaintiff relied upon the terms of the present Rule; and Vice-Chancellor Bacon, being of opinion that the terms of the present Rule were a sufficient answer to the objections raised, overruled the demurrer. The Court of Appeal upheld the decision. "Mr. Barker," said Bacon, V.C., "says he is called upon to be a party to a litigation, in the greater portion of which he has no kind of interest; that many of the questions raised do not concern him; and that he cannot be affected by the result in any way. That is the very thing, which, in my opinion, the Legislature meant to accomplish. It meant to deal with cases in which there were many persons interested, and to give the Court power once for all to dispose of all the interests involved." James, L.J., on the appeal, pointed out that ample protection was afforded to Mr. Barker by the concluding portion of the present Rule, under which the questions in which he was interested might be tried *before* the other questions were disposed of.

Rule 5.

The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes.

This Rule is a re-enactment of the 16th Rule of the principal Act.

As to bills of exchange and promissory notes, see Order II., Rule 6, *supra*, and *The Mercantile River Plate Bank v. Isaac*,* cited under Rule 2 of this Order, *supra*.

By s. 6 of the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), "the holder of any bill of exchange or promissory

* 2 Charley's Cases (Chambers), 23.

note may, if he thinks fit, issue one writ of summons, according to that Act, against all or any number of the parties to such bill or note, and such writ of summons shall be the commencement of an action or actions against the parties therein named respectively, and all subsequent proceedings against such respective parties shall be in like manner, as far as may be, as if separate writs of summons had been issued." It is quite optional with a plaintiff to avail himself of this provision or not; and while it, therefore, in no way fetters his rights against any of the parties, it enables him at the expense of one writ (the service of which, as against any of the parties, he may delay as he thinks fit), to lay the foundation of an action against all.*

Order XVI.,
Rule 5.

The principle of this enactment is extended by this Rule to all actions *ex contractu*.

The trustee appointed to distribute composition among creditors of the receptors of a bill of exchange will not be joined as a party in an action by the indorsee against the acceptors. "The plaintiff," said Mr. Justice Lush, who decided the point at chambers, "could not sue the trustee; there is no privity between them."†

Rule 6.

Where, in any action, whether founded upon contract or otherwise, the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that in such action the question as to which, if any of the defendants is liable, and to what extent, may be determined as between all parties to the action.

This Rule is a re-enactment of Rule 13 of the principal Act.

"In such manner as hereinafter mentioned," i.e., by Rule 13 of this Order,—which see, *infra*. It is submitted that this Rule was intended to apply to a "doubt" striking the mind of the plaintiff after he has commenced his action. If the "doubt" strikes his mind before the commencement of the action, Rule 3 ought to solve it.‡

The first action brought under the present Rule was *Bingham v. Alexanders and Bannister*, the only reports of which will be found in the *Times*.§ It was an action in the alternative by a seller of 12,000 quarters of No. 2 American Spring Wheat against the broker, who, as alleged, bought the wheat, and his principal, who, as alleged, ordered it. Mr. Justice Blackburn expressed approval of this Rule at the first trial.

* Day's Common Law Procedure Acts, 1852, p. 386.

† *Campbell v. Im Thurn*, 1 Charley's Cases (Chambers), 57. See further, as to bills of exchange, cases cited under Rules 2 and 13 of this Order.

‡ It is to be observed that the present Rule was embodied in the Schedule to the Act of 1873, while Rule 3 was framed in 1874, which might account for any tautology.

§ *Times*, 3rd April, 1876. On appeal, *Times*, 30th Jan., 1877. Second trial, *Times*, 27th March, 1877.

Order XVI.,
Rule 6.

One incident of the action was that the plaintiff was obliged to pay the costs of the defendant, against whom he was unsuccessful. These costs did not fall on the defendant against whom the plaintiff succeeded. Again, when a new trial was ordered by the Court of Appeal, it was a new trial in the ordinary sense of the term by the plaintiff against the defendants, but a trial in which one of the original defendants, the broker, appeared as plaintiff, and the other original defendant, the principal, as defendant.

The second case under this Rule appears to have been *The Henderson Inter-Oceanic Railway Company v. Lefevre and Tucker*.^{*} This was an action originally brought, before the 1st of November, 1875, against the defendant Lefevre alone, claiming damages from him for breach of a contract to take up £80,000 worth of debentures in the plaintiff company. The defendant set up as a defence that the promise (if any) was made by Tucker without his knowledge or consent. The plaintiff company obtained leave to continue the action under the Supreme Court of Judicature Acts against Lefevre and Tucker jointly, claiming, in the alternative, damages from Lefevre for breach of contract, and damages from Tucker for breach of warranty that he had authority to bind Lefevre. The Exchequer Division held that the action was one which fell within the scope of the present Rule.

Rule 7.

Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the parties beneficially interested in the trust or estate, and shall be considered as representing such parties in the action; but the Court or a Judge may, at any stage of the proceedings, order any of such parties to be made parties to the action, either in addition to or in lieu of the previously existing parties thereto.

This Rule is a re-enactment of Rule 14 of the Principal Act.

See the 9th Rule of s. 42 of the Stat. 15 and 16 Vict. c. 86, cited under Rule 11, *infra*, which, to some extent, embodies the principle of this Rule.

Rule 8.

Married women and infants may respectively sue as plaintiffs by their next friends, in the manner practised in the Court of Chancery before the passing of this Act; and infants may, in like manner, defend any action by their guardians appointed for that purpose. Married women

^{*} 2 Ex. D., 301; 46 L. J. (Ex.), 391; 36 L. T., 46; 25 W. R., 310.

may also, by the leave of the Court or a Judge, sue or defend without their husbands and without a next friend, on giving such security (if any) for costs as the Court or a Judge may require. Order XVI.,
Rule 8.

This Rule is a re-enactment of Rule 15 of the Principal Act.

All cases in which husband and wife sued together as co-plaintiffs in Chancery, were regarded as suits by the husband alone.* In general, therefore, where the Bill related to *the separate property* of the wife, it was necessary that the Bill should be filed in the name of her next friend; otherwise the defendant might object. Where the wife sued by her next friend, the husband must still have been a party, and it was usual to make him a defendant,† but a husband having no adverse interest to his wife might be made a co-plaintiff.‡

If a Bill in Chancery was filed on behalf of an infant, without a next friend, the defendant might move to have it dismissed with costs, to be paid by the solicitor. Although an infant had a guardian assigned him by the Court, or appointed by will, yet when the infant was plaintiff, the usual course was not to style the guardian by that name, but to call him the next friend. Where the infant was defendant, the guardian was so called. But where an infant was defendant, the Court would appoint a guardian *ad litem* to put in his defence for him and generally to act on his behalf in the conduct and management of the case. The solicitor to the Suitor's Fee Fund was the person generally appointed, but a co-defendant might be appointed if he had no adverse interest.

A married woman may be permitted to sue in *forma pauperis* without a next friend.§ A peccress may be permitted to sue in *forma pauperis*||

A married woman may apply without a next friend, where she has obtained a Protection Order under 20 and 21 Vict. c. 85, s. 21. (*Bate v. The Bank of England*,¶ *Re Rainsdon*.**)

If her husband is out of the jurisdiction,†† or *civiliter mortuus*, a married woman can sue without a next friend.

See, further, the Married Women's Property Act, 1870.

In the case of *Oakes v. Bedford*,‡‡ the Queen's Bench Division allowed a demurrer to a statement of claim in an action by a dressmaker against a married lady, who was living apart, and received an allowance from, her husband. "There would be extreme injustice," the Court said, "in making a charge upon the allowance in the absence of the husband. The action must be amended by bringing in the husband."

* *Wake v. Parker*, 2 Keen, 59, 70; *Davis v. Prout*, 7 Beav., 288, 290.

† *Wake v. Parker*, *ubi supra*; *Davis v. Prout*, *ubi supra*.

‡ *Beardmore v. Gregory*, 2 H. and M., 491; *Meadowcroft v. Campbell*, 13 Beav., 184.

§ *Ex parte Hakewell*, 5 D. M. and G., 116; *Re Foster*, 18 Beav., 525; *Crouch v. Waller*, 48 De G. and J., 43.

|| *Wellesley v. Wellesley*, 16 Sim., 1.

¶ 4 K. and J., 564.

** 4 Drew., 466.

†† See *Postgate v. Barnes*, 11 W. R., 356; 9 Jur. N. S., 456.

‡‡ *Times*, Monday, May 15th, 1876. The plaintiff in this case seems to have omitted to notice the words "may, by the leave of the Court, or a Judge," and to have brought the action without obtaining such leave.

Order XVI.,
Rule 9.

Rule 9.

Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf or for the benefit of all parties so interested.

This Rule is a re-enactment of Rule 10 of the Principal Act.

The Rule is borrowed from the practice of the Court of Chancery. "It has long," says Mr. Daniel,* "been the established practice to allow a plaintiff to sue on behalf of himself and of all others of a numerous class of which he is one, and to make one of a numerous class the only defendant, as representing the others." This proposition is very profusely illustrated by Mr. Daniel in the first and second sections of the fifth Chapter of his work on "Chancery Practice." The reader is referred to these sections, which deserve careful consideration.

Mr. Baron Huddleston, at chambers, held that, where a plaintiff sues on behalf of several parties having the same interest, the names and addresses of the parties, on whose behalf he sues, need not be given.† This was so decided in a case in which an underwriter by his writ sued under the present Rule, "on behalf of himself and all others the underwriters on the steamship or vessel 'Cid,' at the time of the loss in the year 1873," against the owners of the "Cid."

In the subsequent case of *De Hart v. Stevenson*,‡ in which the plaintiff by his writ of summons sued under the present Rule, on behalf of himself and numerous parties having the same interest, and the claim was on behalf of himself and the other owners of a ship for freight and dues for the use of the ship, the Queen's Bench refused to give leave to add the names of the other owners of the ship as plaintiffs. The object of the application in this case was to obtain additional security for costs from the other owners. The Court intimated that if there were strong affidavits to the effect that the defendant would be unable to get his costs from the plaintiff, they might possibly interfere. In *De Hart v. Stephenson* there was no affidavit at all that the plaintiff was unable to pay costs.

It is sufficient, in the estimation of Sir George Jessel, M.R.,§ if the fact that a creditor is suing in an administration action, not only on behalf of himself, but also "on behalf of all the other creditors," appear clearly from the statement of claim; and it is unnecessary to amend the writ of summons by the addition of those words. The writ should show that the action is an ordinary administration suit by the addition of the words "In the matter of the estate of."

* Daniel's Chancery Practice, p. 172.

† *Charles Leathley (on behalf of himself and all others the Underwriters, &c.) v. Robert McAndrew and Company*, 1 Charley's Cases (Chambers), 58.

‡ 1 Q. B. D., 313; 45 L. J. (Q. B.), 575; 24 W. R., 367.

§ *Eyre v. Cox*, 24 W. R., 317. This decision, however, is hardly in keeping with the decision of the same learned Judge in the previous case of *Worraker v. Pryer*, 2 Ch. D., 109; 45 L. J. (Ch.), 273; 24 W. R., 269.

It is, however, submitted that it will be the safer course, in the present conflict of authorities,* for the creditor who as a matter of fact sues, not only on his own behalf, but "on behalf of all the other creditors," for administration, to insert words expressly stating that he does so, in his writ of summons. It cannot be wrong; and it may save some trouble and inconvenience if the addition be held subsequently to be necessary.

Where one party sues on behalf of numerous parties having the same interest, a defence to the plaintiff on the record is a defence to the action.† Per Lindley, J.

Order XVI.,
Rule 9.

Rule 9a.

In any case in which the right of an heir-at-law or the next of kin or a class shall depend upon the construction which the Court may put upon an instrument, and it shall not be known or be difficult to ascertain who is or are such heir-at-law or next of kin or class, and the Court shall consider that in order to save expense or for some other reason it will be convenient to have the question or questions of construction determined before such heir-at-law, next of kin, or class shall have been ascertained by means of inquiry or otherwise, the Court may appoint some one or more person or persons to represent such heir-at-law, next of kin, or class, and the judgment of the Court in the presence of such person or persons shall be binding upon the party or parties or class so represented.

This new Rule was added by the 7th Rule of the Rules of the Supreme Court, June, 1876.

The utility of the new Rule was speedily shown by the case of *Re Pepitt's Estate; Chester v. Phillips*,‡ decided within six months after it was made. The testator died in 1850, and his widow, who was tenant for life and sole executrix of the will, died in 1876. The will, which was evidently the composition of some amateur draftsman, bequeathed the personal property of the testator after the decease of the widow, as follows:—"To be divided equally between my heirs and to their children, with Henry Richard Powell, to be share and share alike." The following questions arose on the construction of the will. (1) Whether the word "heirs" meant "heirs-at-law" or "next of kin." (2) Whether the gift

* In favour of adding the words are *Ponsford v. Hartley*, 2 J. and H., 736; *Woods v. Sowerby*, 14 W. R., 9; *Worraker v. Pryer*, 2 Ch. D., 109; 45 L. J. (Ch.), 273; 24 W. R., 269; *Adcock v. Peters*, W. N., 1876, p. 139; *In Re Royle's Estate, Fryer v. Royle*, 12 N. C., 89. In favour of omitting the words, *Wooldridge v. Norris*, L. R., 6 Eq., 411; *Cooper v. Blissett*, 1 Ch. D., 691; 45 L. J. (Ch.), 272; 24 W. R., 235; and *Eyre v. Cox*, 24 W. R., 317.

† 2 Charley's Cases (Chambers), 24.

‡ 4 Ch. D., 230; 46 L.J. (Ch.), 95; 35 L. T., 902; 25 W. R., 211.

**Order XVI.,
Rule 9a.**

to "children" imported a gift by limitation, or was a gift over to the children of such heir as died before the period of the distribution; if the latter, there would be two classes of children; (a) children who survived their parent and the period of distribution, and (b) children who survived their parent and died before the period of distribution. The testator had no children. His father and mother died before him. He had two brothers and three sisters. The two brothers had not been heard of for more than forty years. One married and had children, but it was not known whether they survived him, and no answers had been received to the advertisements for them. All the three sisters were married, had children, and survived the testator, but died before his widow. Of the two children of the eldest sister, the eldest pre-deceased the testator's widow. Nothing had been heard of the children of the second sister for a long time. The third sister left her husband and eight children surviving her. Letters of administration *de bonis non* were granted to the husband of the testator's third sister, and he commenced an administration suit. On the suit coming on for hearing, on motion for judgment, the plaintiff applied, under the present new Rule, for the appointment of some person to represent the heir-at-law, next of kin, and other classes. Vice-Chancellor Bacon made an order, from which the following is an extract:—"Refer it to chambers to appoint proper persons to represent, for the purpose of obtaining the judgment of the Court on the construction of the will, the following persons and classes respectively:—

- "(a) The persons who were, at the death of the testator, his next of kin according to the Statutes for the Distribution of Intestates' Estates.
- "(b) The heir-at-law of the testator at the time of his death.
- "(c) The children (if any) of the said heir-at-law who died before the day of the death of the testator's widow.
- "(d) The children (if any) of the said heir-at-law, who survived the date of the death of the testator's widow."

Rule 10.

Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of their respective firms, if any; and any party to an action may in such case apply by summons to a Judge for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner and verified on oath or otherwise, as the Judge may direct.

This Rule is a re-enactment of Rule 11 of the Principal Act.

By Order XII., Rule 12, *supra*, when partners are sued in the name of their firm, they must appear individually in their own names. All subsequent proceedings, however, are to continue in the name of the firm. One of several partners has no implied authority at Common Law to enter an appearance for the others.*

An order for a "statement of the names of co-partners" under this Rule cannot be enforced by attachment under Order XXXI., Rule 20.†

* Archbold's Practice, p. 19.

† *Pike v. Keene*, 24 W.R., 322; 35 L.T., 341.

The names of the co-partners in the defendant's firm were ordered by Huddleston, B., at chambers, to be furnished, in an action commenced in a District Registry. An objection, taken under Order XXXV., Rules 1 and 3, that the application should have been made to the District Registrar, and not to the Judge at chambers, was, in this case, overruled.*

Order XVI.,
Rule 10.

See, further, as to partners, Order VII., Rule 2; Order IX., Rules 6 and 6a, *supra*; and the next Rule, and Order XLII., Rule 8 *infra*.

Rule 10a.

Any person carrying on business in the name of a firm apparently consisting of more than one person may be sued in the name of such firm.

This new Rule was added by Rule 8 of the Rules of the Supreme Court, June, 1876. See Rule 6a of Order IX., and the note thereto, *supra*.

Rule 11.

Subject to the provisions of the Act and these Rules, the provisions as to parties, contained in section 42 of 15 & 16 Victoria, Chapter 86, shall be in force as to actions in the High Court of Justice.

The following is the enactment referred to:—

“ It shall not be competent to any defendant in any suit in the said Court† to take any objection for want of parties to such suit in any case to which the Rules next hereinafter set forth extend; and such Rules shall be deemed and taken as part of the law and practice of the said Court, and any law or practice of the said Court inconsistent therewith shall be and is hereby abrogated and annulled.

“ Rule 1. Any residuary legatee or next of kin may, without serving the remaining residuary legatees or next of kin, have a decree for the administration of the personal estate of a deceased person.

“ Rule 2. Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without serving any other legatee or person interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person.

“ Rule 3. Any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like decree.

“ Rule 4. Any one of several *cestuis que trustent* under any deed or instrument may, without serving any other of such *cestuis que trustent*, have a decree for the execution of the trusts of the deed or instrument.

Rule 5. In all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.

“ Rule 6. Any executor, administrator, or trustee may obtain a decree

* *Lynch v. The Overseal Coal Company*, 1 Charley's Cases (Chambers), 59.

† The Court of Chancery. See Morgan and Chute's Chancery Acts and Orders, p. 197.

**Order XVI.,
Rule 11.**

against any one legatee, next of kin, or *cestuis que trustent* for the administration of the estate, or the execution of the trusts.

“ Rule 7. In all the above cases the Court, if it shall see fit, may require any other person or persons to be made a party or parties to the suit, and may, if it shall see fit, give the conduct of the suit to such person as it may deem proper, and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

“ Rule 8. In all the above cases the persons who, according to the present practice of the Court, would be necessary parties to the suit, shall be served with notice of the decree, and after such notice they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit, and they may by an order of course have liberty to attend the proceedings under the decree; and any party so served may, within such time as shall in that behalf be prescribed by the General Order of the Lord Chancellor, apply to the Court to add to the decree.

“ Rule 9. In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but the Court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties.”

This section is retrospective.*

Rule 12.

Subject as last aforesaid, in all Probate actions the rules as to parties, heretofore in use in the Court of Probate, shall continue to be in force.

In an action in the Probate Court, the parties entitled to be plaintiffs are, primarily, the executor; failing him, the party entitled to the residue, or a legatee named in the will, or other party interested under the will, or the representatives of these persons.

Any party whose interest may be adversely affected by the will may be a defendant, and a possibility of interest is sufficient to entitle a party to appear in this character. Amongst the persons who may appear as defendants are:—

1. The widow and next of kin of the deceased, and all other persons entitled in distribution to his personal estate, in the event of his dying intestate, or their representatives.

2. A legatee named in the will, if his legacy has been omitted from the probate, or his representatives.

3. An executor or legatee named in any other testamentary instrument of the deceased, of prior date to the will in question, whose interest is adversely affected by the will, or their representatives.

4 and 5. When an administration has been previously granted, a creditor in possession of administration and a person in possession of administration

* *Fowler v. Bayldon*, 9 Hare, App. LXXVIII.

under section 73 of the Probate Act, 1857, as appointee of the Court, without having a beneficial interest in the estate of the deceased. Order XVI.,
Rule 12.

6. When the will relates to real as well as personal estate, the heir-at-law, devisee, or other persons pretending an interest in such real estate, are to be made defendants, unless the Court shall otherwise direct.

When an executor appears to the citation and propounds the will himself, he becomes nominally a defendant, but does all acts which usually devolve on the plaintiff, *e. g.* delivers the declaration, &c.*

See, further, as to parties in Probate actions, Rules 4, 5 and 6 of the Rules and Orders of the Court of Probate, and Coots and Tristram's Probate Practice, pp. 251-259.

As to "interveners," see, also, Order XII., Rule 16, *supra*.

The practice under the Probate Act, 1857,† of citing "the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by" a will propounded in the Probate Court, is preserved by the present Rule, and will be carried out in the Probate Division.‡ The power of adding parties given by Rule 13 of this Order does not touch the practice referred to.

Rule 13.

No action shall be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined be struck out, and that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability without his own consent thereto. All parties whose names are so

* *Brandreth v. Brandreth and Wife*; 2 Swabey and Tristram, 446.

† 20 & 21 Vict. c. 77, s. 61.

‡ *Kennaway v. Kennaway*, 1 P. D., 148; 45 L. J. (P. D. & A.), 86; 34 L. T., 854; 24 W. R., 586.

Order XVI.,
Rule 13. — added as defendants shall be served with a summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice.

This Rule is a re-enactment of Rule 9 of the principal Act.

See as to mis-joinder and non-joinder of plaintiffs and defendants, and the previous remedies therefor, the note to Rule 1 of this Order, *supra*.

The first clause of this Rule is taken from section 19 of the Common Law Procedure Act, 1860:—"The joinder of too many plaintiffs shall not be fatal"—extended so as to embrace the case of the joinder of too many defendants, also.

It is apprehended that the word "mis-joinder" is intended here to include non-joinder. By s. 49 of the Chancery Amendment Act, 1852, it is provided that "no suit in the Court of Chancery shall be dismissed by reason of the non-joinder of persons as plaintiffs therein."

- Advantage cannot be taken after the 1st of November, 1875, by a defendant of non-joinder of plaintiff in actions of tort, and of non-joinder of a defendant in actions *ex contractu*, by plea in abatement. By Order XIX., Rule 13, *infra*, pleas in abatement are abolished.

The second paragraph of this Rule is founded upon sections 34-39 of the Common Law Procedure Act, 1852. The principles underlying those sections have, however, been considerably extended.

The 34th and 35th sections of the Common Law Procedure Act, 1852, as to the mis-joinder or non-joinder of plaintiffs, and the 37th section of the same Act, as to the mis-joinder and non-joinder of defendants, made a distinction between applications to amend before, and applications to amend at, the trial. Such distinctions are swept away by the present Rule,* which applies to applications made "at any stage of the proceedings." Notices of objection to non-joinder, of course, fall to the ground with pleas in abatement. The present Rule substantially agrees with sections 34 and 35 of the Common Law Procedure Act, 1852, as to the necessity of obtaining the consent of the persons whose names are to be struck out or added, but it does not appear to be any longer necessary that the consent should be in any particular form.

"In manner hereinafter mentioned." See Rule 15 of this Order.

Defendants might have been added or plaintiffs added or struck out, under certain conditions, in a Court of Equity.† See 15 and 16 Vict. c. 86, s. 49.

Where two occupiers of distinct bleachworks, situated on one stream, instituted a suit for the purpose of restraining the defendant company from polluting the stream, Sir George Jessel, M.R., held that there was no pretence for saying that the plaintiffs had a common interest; but, instead of striking out, as he had power to do under the present Rule, the plaintiff improperly joined, he proceeded to hear the suit (by consent), as if two bills had been filed.‡

* See, however, the next Rule.

† See Morgan and Chute's Chancery Acts and Orders, No. 215.

‡ *Appleton v. The Chapel Town Paper Company*, 45 L. J. (Ch.), 276.

In *Norris v. Beazley** the defendant sought to obtain leave to add the name of a company as co-defendants, in an action against him, as acceptor of a bill of exchange given by him in part payment of the purchase-money of a ship which he had bought from the plaintiff. The object of adding the company, for whom the defendant said he was only a trustee, was to enable the company to set up a counterclaim against the plaintiff for damages in respect of fraudulent representations by the plaintiff regarding the ship, by reasons of which the company had incurred useless expense. The Common Pleas Division refused the application, on the grounds that the object of the present Rule was to enable parties to be added *against whom the plaintiff claimed some relief*; and it was not intended that one defendant should be added for the convenience of another. This was an action on a bill of exchange, and a counterclaim by a third party could be no defence to it. The counterclaim was too remote.

**Order XVI,
Rule 13.**

An action of libel was brought against the publisher of a newspaper. It appearing, from the answer of the defendant to the plaintiffs' interrogatories, that one Green was the sole proprietor of the newspaper, the plaintiff, after issue joined, applied on summons to the Master, for leave to add the name of Green as a defendant. The Master refused the application because the addition of the name of Green was not, he thought, "necessary" under the second paragraph of the present Rule. The Judge at chambers, on appeal to him, referred the matter to the Common Pleas. The Common Pleas granted the application of the plaintiff, on the ground that, as Green might have been joined as a defendant at the commencement of the action, under Rule 3 of this Order, it was right and proper at a subsequent stage to add his name as a defendant, under the second paragraph of the present Rule.†

Lush, J., at chambers, refused to strike out the name of the lessor in an action by a builder against the lessor and lessee, although it was alleged that the lessor had no interest in the action.‡

Where an action had come on for trial and been adjourned, Quain, J., at chambers, refused, on the grounds that it was unreasonable at so late a stage of the proceedings, to order the joinder of a third party as defendant.§

Leave was given by Lindley, J., at chambers, to add another defendant in an action under the Summary Procedure on Bills of Exchange Act (18 and 19 Vict. c. 67), after the delivery of the statement of claim.|| (See as to this Act, the case of *Oger v. Bradnum*,¶ cited under Order II., Rule 6, *supra*; *The Mercantile River Plate Bank v. Isaac*,** cited under Rule 2 of this Order, *supra*, and *Campbell v. Im Thurn*,†† cited under Rule 3 of this Order, *supra*.)

In an action by an auctioneer for his commission on a sale of furniture supplied by the defendant to an hotel company, which was subsequently

* 2 C. P. D., 80; 46 L. J. (C.P.), 169; 35 L. T., 845; 25 W. R., 320. See further, as to this case, 36 L. T., 409.

† *Edwards v. Lowther*, 45 L. J. (C.P.), 417; 34 L. T., 255; 24 W. R., 434.

‡ 1 Charley's Cases (Chambers), 59.

§ *Williams v. Andrews*, 1 Charley's Cases (Chambers), 60.

|| 2 Charley's Cases (Chambers), 25.

¶ 1 C. P., 334; 45 L. J. (C. P.), 273; 34 L. T., 578; 24 W. R., 404.

** 2 Charley's Cases (Chambers), 23.

†† 1 Charley's Cases (Chambers), 57.

**Order XVI.,
Rule 13.**

wound up, an application by the defendant to join the official liquidator as a plaintiff, for the purpose of bringing a counterclaim against him. in respect of an alleged property in half the furniture, was refused by Lindley, J., at chambers.*

In an action for mesne profits, against an ejected tenant of the plaintiff's land, received during the plaintiff's incarceration in a lunatic asylum, an application by the defendant to join the plaintiff's sister as defendant, in respect of rent paid to her by him and applied by her to the plaintiff's maintenance in the lunatic asylum, was refused by Mr. Justice Archibald, at chambers,† who said that "if the defendant was led to believe that the plaintiff's sister was the person to whom the rent should be paid, and paid it to her under a mistake of fact, he has a simple remedy against her for money had and received."

In an action by a merchant against solicitors for negligence, in which the defendants admitted their retainer, but alleged that the negligence was not theirs, but that of a third person, in whose hands they put the matter with the plaintiff's consent, an application by the defendants to join this third person as a defendant was refused by Mr. Justice Lindley, at chambers.‡

In an action by a shipowner for demurrage against consignees of the cargo, to which a counterclaim was set up for damage to the cargo, leave to join part owners, alleged to be partly liable on the counterclaim, as co-plaintiffs, was refused by Mr. Justice Lindley, at chambers,§ although Counsel for the plaintiff contended that it was "very hard" that, because the plaintiff brought the action alone, as he was entitled to do, he should have to meet alone a subsequent claim, to which other persons were also liable.

When a right of action does not pass by a deed of transfer of property, the transferee cannot join as co-plaintiff the transferor for the purpose of enforcing the right of action.||

The plaintiff, in an action to restrain the defendants from completing the purchase of building land, was added under the present Rule, on his own application, as a defendant to another action, in which an order was subsequently made, by consent, that the purchase by the defendants should be completed. Vice-Chancellor Malins acceded to an application to strike out the name of the defendants, as by the consent order in the other action the plaintiff must be considered to have abandoned his claim against the defendants in this action; but, as the application to strike out the name of the defendants in this action was not made immediately on the consent order in the other action being made, and the defendants had, after the consent order in the other action was made, put in a statement of defence in this action, on which the plaintiff had joined issue, the Court, while making the order to strike out the defendants, refused them costs. The Vice-Chancellor said that the power given by this Rule of striking out defendants was "most beneficial."¶

* *Beck v. Dear*, 2 Charley's Cases (Chambers), 25.

† *Lovell v. Holland*, 2 Charley's Cases (Chambers), 26.

‡ *Lereculey v. Harrison*, 2 Charley's Cases (Chambers), 27.

§ *Cormack v. Grafian*, 2 Charley's Cases (Chambers), 28.

|| *New Westminster Brewery Company v. Hannah*, 1 Ch. D., 278; 24 W. R., 899. Affirmed on Appeal, W. N., 1877, p. 35.

¶ *Vallance v. The Birmingham and Midland Land and Investment Corporation*, 2 Ch. D., 369; 24 W. R., 454.

Rule 14.

Order XVI,
Rule 14.

Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a Judge at any time before a trial by motion or summons, or at the trial of the action in a summary manner.

“By motion” in Court, or “summons” at chambers.

The application to amend should in general be made to a Judge at chambers. by summons, calling upon the opposite party to show cause why the party applying should not have leave to amend.*

“In a summary manner.” Probably in the same manner as hitherto, i.e., the manner prescribed by s. 23 of the 3 and 4 Wm. IV. c. 42.† The Court or Judge shall “cause the writ or other documents to be forthwith amended by some officer of the Court, or otherwise, in every part of the pleadings which it may be necessary to amend.”

See, as to the application of this Rule, to a consolidated action, the case of *In Re Wortley, Culley v. Wortley*; *In Re Wortley, Harward v. Storey*,‡ cited under the next Rule.

Where the widow of a farmer, who died bankrupt, sought to recover in an action from her son-in-law and daughter £400, which she had saved by careful management in her husband's lifetime, and which he had allowed her to consider as her own, but which, while her husband was lying on his death bed, her daughter had abstracted from a safe in his bedroom, Lush, J., who tried the action, refused leave at the trial to add, under the present Rule, the name of the trustee in bankruptcy as co-plaintiff, on the ground that the question, whether the trustee in bankruptcy was entitled to the fruits of the verdict, was not “a question involved in the action.” His lordship, however, directed the amount recovered in the action (£350) to be paid into Court, until the opinion of the Court above should have been taken as to the respective claims of the plaintiff and the trustee in bankruptcy to the amount.§

Rule 15.

Where a defendant is added, unless otherwise ordered by the Court or Judge, the plaintiff shall file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ, or notice in lieu of service thereof, in the same manner as original defendants are served.

No provision is made for the case of a plaintiff being added. Section 36 of the Common Law Procedure Act, 1852, provides that the plaintiff is to be at liberty in such case to amend the writ and other proceedings

* Archbold's Practice, p. 1559.

† See s. 36 of the Common Law Procedure Act, 1852.

‡ 4 Ch. D. 180; 46 L. J. (Ch.), 182; 25 W. R., 295.

§ *Times*, Thursday, July 13th, 1876, North Eastern Circuit, Newcastle (July 8th, 1876).

Order XVI., by adding the new names; and the defendant is to be at liberty to plead
Rule 15. *de novo.*

The practice under the Common Law Procedure Act, 1852, in the case of the addition of the names of the new defendants upon notice or plea of nonjoinder is given in s. 38 of that Act:—

“The plaintiff shall be at liberty, without any order, to amend the writ of summons and the declaration by adding the name or names of the person or persons named in such plea in abatement as joint contractors, and to serve the amended writ upon the person or persons named in such plea in abatement, and to proceed against the original defendant or defendants and the person or persons so named in such plea in abatement; provided that the date of such amendment shall, as between the person or persons so named in such plea in abatement and the plaintiff, be considered, for all purposes, as the commencement of the action.”

The cases of *In Re Wortley, Culley v. Wortley*; *In Re Wortley, Harward v. Storey*,* two suits for the administration of the same estate, having been consolidated, it was proposed to add an administrator *de bonis non* as a defendant to the consolidated action. A difficulty arose in carrying out the provision of the present Rule that an amended copy of the writ of summons should be filed and served on the new defendant, there being no writ of summons (so to speak) in a *consolidated* action. Sir George Jessel, M.R., said that the present Rule did not meet the case of consolidated actions, and he directed the administrator *de bonis non* to be made a defendant under Rule 14 of this Order, without service on him of any writ of summons.

Rule 16.

If a statement of claim has been delivered previously to such defendant being added, the same shall, unless otherwise ordered by the Court or Judge, be amended in such manner as the making such new defendant a party shall render desirable, and a copy of such amended statement of claim shall be delivered to such new defendant at the time when he is served with the writ of summons or notice, or afterwards, within four days after his appearance.

As to the amended declaration (statement of claim), see the provisions of s. 38 of the Common Law Procedure Act, 1852, cited in the note to the last Rule.

Section 60 of that Act furnishes a form of the commencement of the amended declaration (now amended statement of claim):—

“A.B., by E.F., his attorney [or in his own proper person, &c.] sues C.D. and G.H., which said C.D. has heretofore pleaded in abatement the nonjoinder of the said G.H.” Of course the insertion of the words “which said C.D. has heretofore pleaded in abatement the nonjoinder of the said G.H.” are now unnecessary, as pleas in abatement are abolished by Order XIX., Rule 13, *infra*.

* 4 Ch. D., 180; 46 L. J. (Ch.), 182; 25 W. R., 295.

Rule 17.

Order XVI.,
Rule 17.

Where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person, or where from any other cause it appears to the Court or a Judge that a question in the action * should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the Court or a Judge may, on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined.

This Rule is a re-enactment of Rule 12 of the Principal Act, with the omission of the words "in such manner and form as may be prescribed by Rules of Court," after "such last-mentioned person."

As to giving notice to the third person, see Rule 19 of this Order, *infra*.

See, as to the subject-matter of this Rule, the Principal Act, s. 24, subsection (3). This Rule is copied, almost *verbatim*, from the First Report of the Judicature Commission, who recommended its adoption.

The following Rules (18-20) introduce the new practice on this subject.

"This power is a discretionary one, and in the exercise of its discretion the Court ought to consider whether the plaintiff's interests will be prejudiced or affected, and if the plaintiff's interests will be prejudiced or delayed the power ought not to be exercised." Per Mellish, L.J., in *Bower v. Hartley*.†

The plaintiff in that case claimed damages for negligence on the part of the defendants (who were insurance brokers at Liverpool) in the mode of effecting insurances on a cargo shipped by him abroad, by reason of which he had not been able to recover upon the policies as much as he otherwise would have done. One of the policies, a French one, was effected by the defendants through another firm of insurance brokers at Liverpool, and the defendants applied for leave to give notice to that firm under these Rules, that he claimed indemnity from them in respect of the French policy. Leave was given by Lindley, J.; but the Queen's Bench Division set aside the Judge's order, and the Court of Appeal dismissed, with costs, the defendants' appeal from the decision of the Queen's Bench Division. The negligence between the plaintiff and defendants would not in this case have been the same as the negligence between the defendants and the firm from whom the defendants claimed indemnity, "because the defendants had not communicated to that firm instructions, as to the mode in which the insurance was to be effected, given by the plaintiff to the defendants. Admissions that the French policy was invalid, made by the defendants, would not, moreover, have been evidence against the firm

* See, as to the meaning of these words, *Horwell v. The London General Omnibus Company*, 2 Ex. D., 365; 36 L. T., 637; 12 N. C., 109, reversing decision of Exchequer; 25 W. R., 511; W. N., 1877, p. 105.

† 1 Q. B. D., 652; 46 L. J. (Q.B.), 126; 24 W. R., 941.

Order XVI., from whom the defendants claimed indemnity." The appeal, too, was
Rule 17. only decided on the 15th of July, 1876; and the action was set down for
 ----- trial at the Liverpool Summer Assizes on the 22nd. The bringing in
 of a third party would probably have thrown the action over the Long
 Vacation.

It is not, however, necessary that the whole question between the plaintiff, the defendant, and the third party, should be identical; it is sufficient if it be *prima facie* apparent that a material question in the action is also a question between the defendant and the third party.*

In the case of *Benecke v. Frost*,† a firm of brokers, sued for not accepting 183 chests of "fine button shellac," set up as a defence, first, that their principals, and not they, were liable, if any one; secondly, that the shellac was not according to the quality stipulated for. Two of the principals, one of whom had contracted on precisely similar terms with the defendants for the sale to him of 50 of the chests of the "fine button shellac," and the other for the remainder, were, by the Queen's Bench Division, ordered to appear as third parties under these Rules.

In the case of the *Swansea Shipping Company v. Duncan*,‡ the defendants were sued for 31 days' demurrage, at £12 a-day, under a charter-party, by which they had agreed to discharge a cargo of nitrate of soda as fast as the custom of the port of discharge would allow. The defendants had taken no part in the discharge of the cargo, which was effected by the British Agricultural Association, Limited, to whom the defendants had sold the cargo, and who were bound, both by express agreement and also by the custom of the trade, to indemnify the defendants against any liability incurred by the defendants for the detention of the ship at the port of discharge. The Court of Appeal, reversing the decision of the Queen's Bench Division, held that this was exactly a case coming within the present Rules, and that the defendants were entitled to give the British Agricultural Association notice to appear as a third party under them. "A material question," said Jessel, M.R., "is common both between the plaintiffs and the defendants, and the defendants and the third persons, as to whether the ship was discharged as fast as the custom of the port allowed."

In the case of *Treleaven v. Bray*,§ it was alleged that a trustee for the defendants refused to concur in a conveyance by them to the plaintiff, who sued them for specific performance of an agreement to sell; and the Court of Appeal, overruling Jessel, M.R., gave leave to the defendants to serve the trustee with notice under these Rules. The defendants might, it was successfully urged, be made to pay the costs of the suit, and the defendants would then seek to recover these costs from the trustee.

In an action by an intending purchaser against auctioneers for his deposit money, the vendor was ordered to come in as a third party, he claiming the deposit money as forfeited.||

* *Benecke v. Frost*, 1 Q. B. D., 419; 45 L. J. (Q. B.), 693; 34 L. T., 728; 24 W. R., 669; *Swansea Shipping Company v. Duncan*, 1 Q. B. D., 644; 45 L. J. (Q. B.), 423, 638; 34 L. T., 685; 35 L. T., 879; 24 W. R., 205; 25 W. R., 233; *Bower v. Hartley*, 1 Q. B. D., 652; 46 L. J. (Q. B.), 126; 24 W. R., 941.

† 1 Q. B. D., 419; 45 L. J. (Q. B.), 693; 34 L. T., 728; 24 W. R., 669.

‡ 1 Q. B. D., 644; 45 L. J. (Q. B.), 423, 638; 34 L. T., 685; 35 L. T., 879; 24 W. R., 205; 25 W. R., 253.

§ 1 Ch. D., 176; 45 L. J. (Ch.), 113; 33 L. T., 827; 24 W. R., 198.

|| *Tebbs v. Lewis*, 1 Charley's Cases (Chambers), 61.

Where an agent was defendant in an action at the suit of his principals for an account, and also defendant in an action for breach of contract, which he made on behalf of the same principals, an order of the Master, that the plaintiffs in the former action should be bound as third parties by the sum which their agent was bound liable to pay in the latter action, was sustained by Quain, J., at chambers, on appeal from the Master; but his lordship refused to confirm the further order of the Master that the plaintiff in the second action should be made a party to the first action, on the ground that he had nothing whatever to do with it.*

Order XVI.,
Rule 17.

Quain, J., at chambers, decided that where, in an action by the indorsee of a bill of exchange against the acceptor, the defendant claims indemnity from the drawer, the defendant is entitled to serve the drawer with notice as a third party under the present Rule. It was argued that notice should have been given to the third party of the application for leave to serve him with notice, but Quain, J., ruled that no notice need be given to the person whom it is intended to make a third party to attend the application for leave to serve him with a notice as a third party.†

In the case of *The Northampton Waterworks Company v. Easton*,‡ the Queen's Bench Division appear to have granted a *rule nisi* for leave to serve a third party with notice. The action in that case was against the defendant for damage caused by a bad crank with which he supplied the plaintiff company, and which broke down through being badly wrought or forged, and the defendant applied *ex parte* to serve a firm of ironfounders who had forged the crank, and who was liable over to the defendant, with notice under these Rules.

In an action for expenses incurred in removing wreck, the defendants claiming indemnity from a railway company, which admitted its liability, the company was substituted, by order of Pollock, B., at chambers, by consent, as defendants in place of the original defendants, who withdrew.§

In an action by builders for work done under a contract to build a church, leave was given to the defendants to serve the architect with notice of a claim for indemnity in respect of costly extras, ordered by him without express authority.||

Where an action was brought for the price of ironwork to be used in a building, and the building contractor had agreed to pay the defendants for the ironwork, and had received notice as a third party, Lush, J., at chambers, ordered that the building contractor should be bound by the amount that might be paid to the plaintiff by the defendants in the action.¶

Rule 18.

Where a defendant claims to be entitled to contribution, indemnity, or other remedy or relief over against any

* *Seligman and others (Trustees, &c.) v. Mansfield, White v. Mansfield*, 1 Charley's Cases (Chambers), 62.

† *Pearson v. Lane*, 1 Charley's Cases (Chambers), 63.

‡ *Times*, Wednesday, April 12th, 1876.

§ *Commissioners of Waterford v. Veale, Begg, and Evans*, 2 Charley's Cases (Chambers), 29.

|| *Dawes v. Thornton*, 2 Charley's Cases (Chambers), 29.

¶ *Measures v. Thomas and Jones*, 1 Charley's Cases (Chambers), 65.

Order XVI.,
Rule 18.

person not a party to the action, he may, by leave of the Court or a Judge, issue a notice to that effect, stamped with a seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer, and served on such person according to the Rules relating to the service of writs of summons. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the Court or a Judge, be served within the time limited for delivering his statement of defence. Such notice may be in the form or to the effect of the Form No. 1 in Appendix (B) hereto, with such variations as circumstances may require, and therewith shall be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action.

See, as to the course which a third person served with notice under this Rule ought to take, Rule 20 of this Order, *infra*.

Subsection (3) of the 24th section of the Principal Act, and, it would seem, Rules 17 and 19 of this Order, are applicable to claims by one defendant against another, as well as to claims over by a defendant against a third party. The present Rule, and the 20th and 21st Rules of this Order, on the other hand, apply only to claims over by a defendant against a third party. It is not, therefore, necessary to give "notice" under the present Rule of a claim by a defendant against his co-defendant. "Notice in writing" of such a claim is sufficiently given by a defendant to his co-defendant by *delivering* it to the co-defendant.* The distinction between Rules 17 and 19 of this Order and subs. (3) of the 24th section of the Principal Act, on the one hand, and the present Rule and Rules 20 and 21 of this Order, on the other, will be evident on comparing the language used, which is, in the former case, "*any other person*," and the latter, "*a person not a party to the action*."

A counterclaim cannot be set up against a third party,† nor, in the view of Jessel, M.R., against a co-defendant. A counterclaim must, in his lordship's view, come within the language of Order XIX., Rule 3, or of Order XXII., Rule 5, and ask for cross relief against *the plaintiff*, alone, or against *the plaintiff* along with some other person or persons.‡

In the case of *Dear v. Sworder*, *Sworder v. Dear*,§ a second mortgagee brought an action for an account against a first mortgagee, who had contracted, under his power of sale, to sell the property to

* *Shepherd v. Beane*, 2 Ch. D., 223; 45 L. J. (Ch.), 429; 2 Charley's Cases (Court), 58; 24 W. R., 363.

† *Warner v. Twining*, 24 W. R., 536; 2 Charley's Cases (Court), 59.

‡ *Furness v. Booth*, 4 Ch. D., 586; 46 L. J. (Ch.), 112; 25 W. R., 267.

§ 4 Ch. D. 476; 46 L. J. (Ch.), 100; 25 W. R., 124.

one Redhead, and the plaintiff claimed that the defendant might be required to complete the purchase and obtain payment of the unpaid purchase-money. The defendant delivered a defence and counterclaim against the plaintiff and the purchaser, Redhead, claiming specific performance against the purchaser, Redhead, and that the plaintiff might be ordered to concur in the conveyance. On the purchaser, Redhead, applying to have the counterclaim, so far as it sought relief against him, excluded, on the ground that the proceedings were misconceived, as they should have been taken against him under these Rules as a third party, Vice-Chancellor Hall refused the application with costs.

Order XVI.,
Rule 18.

"A copy of such notice shall be served according to the Rules relating to the service of writs of summons." This lets in Order XI., Rule 1; if, therefore, a writ of summons can be served out of the jurisdiction within the terms of that Rule, so can a copy of the notice to a third party under the present Rule.*

In the case of *Harry v. Davey*, the defendants appear to have mixed up the present Rule very strangely with Rule 13 of this Order, *supra*, applying for, and obtaining leave under the present Rule (or Rule 19, it does not quite appear which), to serve third parties with notice of motion to add them as parties under Rule 13! The leave under the present Rule (or Rule 19) was given†; but the motion under Rule 13 was refused.‡

In *In Re Collic, Ex Parte Smith*,§ A sold and delivered goods to B, who, before payment, became bankrupt. A then brought an action for the price of the goods against C, alleging that B had brought them on account of C, as an undisclosed principal. The defendant C served the trustee in bankruptcy of B with notice under these Rules. It was held by the Court of Appeal that, as the defendant was entitled to indemnity out of the bankrupt's estate in respect of the contract, the Court of Bankruptcy had no jurisdiction to restrain the action.

See, as to the right of the third party who receives notice under this Rule, to give notice to a fourth party, the somewhat conflicting decisions in *Walker v. Balfour*,|| and *Fowler v. Knoop*.¶

Rule 19.

When, under Rule 17 of this Order, it is made to appear to the Court or a Judge, at any time before or at the trial, that a question in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff and the defendant and any other person, or between any or either of them,

* *Benecke v. Frost*, 1 Q. B. D., 419; 45 L. J. (Q. B.), 693; 34 L. T., 728; 24 W. R., 669.

† 24 W. R., 515, by Bacon, V.C.

‡ 2 Ch. D., 721; 45 L. J. (Ch.), 697; 34 L. T., 842; 24 W. R., 576; by Bacon, V.C.

§ 2 Ch. D., 51; 45 L. J. (Bkcy.), 116; 34 L. T., 603; 24 W. R., 310. See the decision of the Court of Bankruptcy, 1 Charley's Cases (Court), 71.

|| 25 W. R., 511.

¶ 36 L. T., 219; W. N., 1877, p. 68.

Order XVI,
Rule 19.

the Court or a Judge, before or at the time of making the order for having such question determined, shall direct such notice to be given by the plaintiff at such time and to such person, and in such manner as may be thought proper, and, if made at the trial, the Judge may postpone such trial as he may think fit.

See Rules 17 and 18 of this Order, and the notes thereto, *supra*.

Rule 20.

If a person not a party to the action, who is served as mentioned in Rule 18, desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, he must enter an appearance in the action within eight days from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise. Provided always, that a person so served and failing to appear within the said period of eight days, may apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or a Judge shall think fit.

See Rule 18 of this Order, *supra*.

"Within eight days." "If the number of days allowed for appearances under Order XI., Rule 4, be more than eight," the present "Rule must be taken to be so far modified that an appearance within the time limited," under Order XI., Rule 4, "though more than eight days, would be sufficient." Per Jessel, M.R., in *The Swansea Shipping Company v. Duncan*.*

Rule 21.

If a person not a party to the action, served under these Rules, appears pursuant to the notice, the party giving the notice may apply to the Court or a Judge for directions as to the mode of having the question in the action determined; and the Court or Judge, upon the hearing of such application, may, if it shall appear desir-

* 1 Q. B. D., 644; 45 L. J. (Q. B.), 638; 34 L. T., 682; 24 W. R., 208.

able so to do, give the person so served liberty to defend the action upon such terms as shall seem just, and may direct such pleadings to be delivered, or such amendments in any pleadings to be made, and generally may direct such proceedings to be taken, and give such directions, as to the Court or a Judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the person so served shall be bound or made liable by the decision of the question.

Order XVI.,
Rule 21.

“Served under these Rules,” i.e. under Rules 17, 18, 19 and 20 of this Order, *supra*.

In an action by the intending purchaser against the auctioneer for the deposit money, the vendor, who appeared as a third party, was ordered by Huddleston, B., at chambers, on an application by the original defendant for directions under this Rule, to plead to the statement of claim as it stood, and to deliver his statement of defence and counter-claim, if any, to the plaintiff and the original defendant, the plaintiff to have leave to reply and the original defendant to have leave to amend his defence, if necessary, within six days.*

On an application by the defendants for directions as to future proceedings, in an action by the holders of a bill of exchange against them as acceptors, in which the drawer had appeared as the third party, after notice that the defendants claimed indemnity from him for partial failure of the consideration, the defendants were directed to pay the amount of the bill, less the amount of the alleged failure, the drawer to pay the latter amount, and then to be substituted for the holders, as plaintiff.†

“As to the extent to which the person so served shall be bound or made liable.” These words, as was pointed out by Mellish, L.J., and Denman, J., in the case of *Benecke v. Frost*,‡ afford a very important protection to the third party who receives notice under Rules 17 and 18 of this Order. In the case of *Benecke v. Frost*,‡ already noticed under Rule 17 of this Order, *supra*, the following order was made:—“It is ordered that Messieurs Thew and Co. (one of the principals) be at liberty to appear by Counsel and defend this action, as they may be advised, so far as regards the quality of the shellac, but upon no other question; and that they be bound by the finding of the jury upon that question.”§ The costs to be ultimately paid to and by the two principals respectively, and the costs incurred by the plaintiffs in appearing to the motion for directions, were reserved for the decision of the Judge after the trial, subject to appeal to the Court; but the costs occasioned by the motion of Messieurs Thew and Co. to set aside the notice were ordered to be the defendants’ in any event as between them and Messieurs Thew and Co.

* *Tebbs v. Lewis, Kemp and Green*, 1 Charley’s Cases (Chambers), 66.

† *The National Provincial Bank of England v. The Bradly Bridge Charcoal, Iron and Foundry Company*, 2 Charley’s Cases (Chambers), 30.

‡ 1 Q. B. D., 419; 45 L. J. (Q.B.), 693; 34 L. T., 728; 24 W.R., 669.

§ Messrs. Rea and Co., the other principals, had consented, previously, to be bound by the finding of the jury upon that question. See, also, the order made in *Norris v. Beazley* under this Rule, 36 L. T., 409.

**Order XVII.,
Rule 1.**

ORDER XVII.

JOINDER OF CAUSES OF ACTION.

Rule 1.

Subject to the following Rules, the plaintiff may join in the same action and in the same statement of claim as many causes of action, but if it appear to the Court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or Judge may order separate trials of any of such causes of action to be had, and may make such other order as may be necessary or expedient for the separate disposal thereof.

This Rule is a re-enactment of Rule 22 of the Principal Act, the words "subject to the following Rules," being substituted at the commencement of the Rule, for "subject to any Rules of Court."

The Rule is taken from s. 41 of the Common Law Procedure Act, 1852, which, like the present Rule, is permissive only, not compulsory. In re-enacting substantially, however, the provisions of the 41st section of the Act, the legislature has taken care to omit two important qualifications contained in that section, viz.:—that the causes of action, when joined, must be "against the same parties and in the same rights."

The latter part of this Rule, like Rules 8 and 9 of this Order, is intended to provide a remedy against the evils of *multifariousness* in pleading.†

Rule 2.

No cause of action shall, unless by leave of the Court or a Judge, be joined with an action for the recovery of land, except claims in respect of mesne profits, arrears of rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held.

By section 41 of the Common Law Procedure Act, 1852, it is expressly provided that the permission thereby given to join several causes of action shall not extend to replevin or to ejectment. The exception as to replevin would seem to be repealed by this Rule.

"Claims in respect of mesne profits." The claimant in ejectment may

* The wide field opened up for plaintiffs by Order XVI., would, of itself, be sufficient to account for this omission.

† Per Baggallay, L.J., in *Cox v. Barker*, *Barker v. Cox*, 3 Ch. D. 359; 35 L. T., 622, 685. See, also, *Child v. Stenning*, 36 L. T., 426; 1 W. R., 519; 12 N. C., 82.

under s. 214 of the Common Law Procedure Act, 1852, after proof of his right to recover possession of the premises mentioned in the writ in ejectment, go into evidence of mesne profits, whether the defendants appear on the trial of ejectment or not. Under that enactment it is unnecessary to state anything, either in the writ or issue, in order to entitle the plaintiff in ejectment to recover mesne profits.*

Order XVII.,
Rule 2.

It is to be observed that the causes of action, which may now for the first time be joined with ejectment in relation to arrears of rent and damages for breach of contract, must relate to *the same premises* as those, the possession of which is sought to be recovered.

Leave was given to the Masters of the Bench of Gray's Inn, under the present Rule, in the celebrated case of *Manisty v. Kenealy*,† to join with an action for the recovery of a set of chambers in Gray's Inn, of which Dr. Kenealy had been a trustee, a claim for an order to the defendant to execute a conveyance of the property to new trustees.

Sir George Jessel, M.R., in *Cook v. Enchmarch*,‡ gave leave, under the present Rule, to join with an action for the recovery of land (1) a claim for an injunction to restrain one of the defendants from receiving the rents and profits of the same land; (2) for the appointment of a receiver of the rents and profits of the same land; and (3) for the delivery up and cancellation of a deed under which the defendant previously mentioned claimed to be entitled to the same land.

In a subsequent case,§ Sir George Jessel, M.R., while granting leave, under the present Rule, to join with an action for the recovery of land a claim for a receiver of the rents and profits of the same land, intimated a doubt as to the necessity of obtaining leave for such a joinder of causes of action.

Leave was given by Vice-Chancellor Hall, under the present Rule, to join an action to administer the personal estate of a testator with an action to establish title to part of the testator's real estate; the real and personal estate being comprised in the same gift over in a will.|| In this case the Vice-Chancellor decided that an action to establish title to land was "an action for the recovery of land," within the meaning of the present Rule, although separate forms of indorsement of claim are given for those actions respectively in Appendix (A), Part II., Section 4.

Whetstone v. Dewis was cited as an authority by Counsel *arguendo* in the case of *Kitching v. Kitching*,¶ in which Sir George Jessel, M.R., gave leave to join, under this Rule, with an action by the heir-at-law, who was also one of the next-of-kin, for the recovery of the land of an intestate from the administratrix who had entered into possession of the land, a claim for the administration of the intestate's personal estate.

Sir George Jessel, M.R., has decided that a foreclosure action is not an action for the recovery of land within the meaning of this Rule. Leave is, therefore, unnecessary, to join a claim for the administration of the trusts of a mortgage-deed with an action for the foreclosure of the mortgage.**

* *Smith v. Tett*, 23 L. J. (Ex.), 93; 9 Ex., 307. + 24 W. R., 918.

† 2 Ch. D., 111; 45 L. J. (Ch.), 504; 24 W. R., 293.

§ *Allen v. Kennet*, 24 W. R., 845.

|| *Whetstone v. Dewis*, 1 Ch. D., 99; 45 L. J. (Ch.), 49; 33 L. T., 501; 24 W. R., 93; 1 Charley's Cases (Court), 92.

¶ 24 W. R., 901; W. N., 1876, p. 225; 11 N. C., 155.

** *Tawell v. The Slate Company*, 3 Ch. D., 629.

Order XVII.,
Rule 3.

Rule 3.

Claims by a trustee in bankruptcy, as such, shall not, unless by leave of the Court or a Judge, be joined with any claim by him in any other capacity.

The words "provided the claims are in the same rights," which occur in s. 41 of the Common Law Procedure Act, 1852, being omitted in Rule 1 of this Order, it becomes necessary to specify the cases in which causes of action accruing in different rights cannot be joined, and the present Rule specifies one of them.

It is not necessary for a trustee in bankruptcy to describe himself as such in the writ of summons, when suing in that capacity. By Rule 5 of Trinity Term, 1853, in actions by assignees in bankruptcy, the character, in which they are stated in the record to sue or be sued, is not to be considered as in issue, unless specially denied.

Rule 4.

Claims by or against husband and wife may be joined with claims by or against either of them separately.

This Rule is in accordance with Rule 1 of this Order—claims in *different* rights may be joined.

See as to actions by married women without their husbands or next friends, Order XVI., Rule 8, *supra*.

This enactment is an extension of the principle contained in section 40 of the Common Law Procedure Act, 1852:—"In any action brought by a man and his wife for injury done to the wife in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right." As pointed out by Mr. Day,* counts for goods sold and delivered, and money lent by the husband, might be joined under the latter enactment to the joint cause of action in respect of injury done to the wife, the terms of it are so wide.

Rule 5.

Claims by or against an executor or administrator, as such, may be joined with claims by or against him personally; provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues, or is sued, as executor or administrator.

This Rule introduces an important alteration in the law. It was expressly laid down† that it is not competent to a plaintiff to join in the same action claims by him *personally* with claims by him *as an executor or administrator*.

* Common Law Procedure Acts, p. 79.

† 2 Wms. Saunders, 117, f. (2); 2 Wms. Exors., 6th edn., p. 1729.

In suing an executor or administrator, it frequently becomes a question whether he should be sued as legal personal representative or personally; and the minds of the framers of this Rule were directed to *Ashby v. Ashby*,* and cases of the same class,† where the executor or administrator has been dealing with the assets or making contracts, in the course of the administration, properly and fairly in his character of executor or administrator, and then it becomes a question whether, the contracts having been entered into by him personally, he should be sued in his character of a legal personal representative, or in his personal character, being left afterwards to get payment, if he could, out of the assets, in a course of administration. The object of the present Rule is to get over such difficulties.‡

Order XVII.,
Rule 5.

Rule 6.

Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant.

One of the qualifications—"against the same defendant"—mentioned in section 41 of the Common Law Procedure Act, 1852, is introduced in this case.

See Order XVI., Rule 1, *supra*.

Rule 7.

The last three preceding Rules shall be subject to Rule 1 of this Order, and to the Rules hereinafter contained.

This is rather an extraordinary Rule. Rule 1 is stated to be "subject to the following Rules," which include the "three preceding Rules" referred to in the present Rule, while "the three preceding Rules" are declared by the present Rule to be "subject to Rule 1!" The meaning probably of "subject to Rule 1" is, that a Court or a Judge may, in any of the three last cases, "order separate trials" (see Rule 1)—an interpretation which is confirmed by the words, "subject to the Rules hereinafter contained," these Rules setting out the *modus operandi* by which the defendant may counteract the effect of the principles laid down in Rules 4, 5, and 9. (See a similar see-saw, Order XXXVI., Rules 3, 4, and 6.)

Rule 8.

Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of in one action, may at any time

* 7 B. & C., 444.

† E.g., *Farhall v. Farhall*, L. R., 7 Ch., 123.

‡ Per Hall, V.C., in *Padwick v. Scott*, 2 Ch. D., 736; 45 L. J. (Ch.), 250; 24 W. R., 723.

Order XVII.,
Rule 3.

apply to the Court or a Judge for an order confining the action to such of the causes of action as may be conveniently disposed of in one proceeding.

This and the next Rule supply the *modus operandi* for working out the proviso attached to Rule 1, "but if it appear to the Court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or Judge may order separate trials of any such causes of action to be had, or may make any such other order as may be necessary or expedient for the separate disposal thereof."

This proviso to Rule 1 and the present Rule and Rule 9 are all intended to provide a remedy against *multifariousness* in pleading.*

In *Hall v. The Old Talargoloch Lead Mining Company, Limited*,† which was an action brought by a shareholder against an insolvent Company, that was being voluntarily wound up, and also against the directors of the company, for issuing a fraudulent prospectus, and claiming to be relieved from all further liability in respect of his shares. Vice-Chancellor Hall refused an application, ostensibly under the present Rule, on behalf of the liquidator of the company, to confine the action to one against the directors alone. His lordship characterized the motion as "an experiment," which must be visited with costs.

Rule 9.

If, on the hearing of such application as in the last preceding Rule mentioned, it shall appear to the Court or a Judge that the causes of action are such as cannot all be conveniently disposed of in one action, the Court or a Judge may order any of such causes of action to be excluded, and may direct the statement of claim, or, if no statement of claim has been delivered, the copy of the writ of summons,‡ and the indorsement of claim on the writ of summons, to be amended accordingly, and may make such order as to costs as may be just.

See the note to Rule 8 of this Order, *supra*.

ORDER XVIII.

ACTIONS BY AND AGAINST LUNATICS AND PERSONS OF
UNSOUND MIND.

In all cases in which lunatics and persons of unsound

* Per Baggallay, L. J., in *Cox v. Barker, Barker v. Cox*, 3 Ch. D., 369; 35 L. T., 622, 685.

† 45 L. J. (Ch.), 775; 34 L. T., 901.

‡ See Order XXI., Rule 4.

mind not so found by inquisition might respectively before Order XVIII. the passing of the Act have sued as plaintiffs or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend in manner practised in the Court of Chancery before the passing of the said Act, and may in like manner defend any action by their committees or guardians appointed for that purpose.

As to service of the writ of summons, in the case of lunatics and persons of unsound mind, not so found by inquisition, see Order IX., Rule 5, *supra*, and the note thereto.

As to the appointment of a guardian *ad litem*, in the case of persons of unsound mind, not so found by inquisition, see Order XIII., Rule 1, *supra*.

This Order places lunatics and persons of unsound mind, not so found by inquisition, on the same footing, *mutatis mutandis*, as that on which infants are placed, with respect to suing and being sued, under Order XVI., Rule 8, *supra*.

Suits on behalf of a lunatic were usually instituted, in the Court of Chancery, in the name of the lunatic; but as he was a person incapable at law of taking any steps on his own account, he sued by the committee of his estate, if any, or if none, by his next friend, who was responsible for the conduct of the suit. The committee or next friend must have been joined as a co-plaintiff or a defendant. Where the committee of a lunatic filed a Bill on behalf of the lunatic, without joining himself as co-plaintiff, the case was directed to stand over, with liberty to amend, by making the committee co-plaintiff.*

If the person exhibiting a Bill appeared upon the face of it to be a lunatic, and no next friend or committee was named in the Bill, the defendant might demur;† but if the incapacity did not appear on the face of the Bill, the defendant must have taken advantage of it by plea.

A committee previously to instituting an action on behalf of the lunatic, should obtain the sanction of the Lord Chancellor or of one of the Lords Justices.‡ In order to obtain such sanction a state of facts showing the propriety of the suit should be laid before the Master in Lunacy, and a report obtained from him approving of the suit, which report must be confirmed by the Lord Chancellor or by the Lord Justice.

Persons of unsound mind, not so found by inquisition, were permitted to sue by their next friend; and it seems that if a bill had been filed in the name of a plaintiff who, at the time of filing it was in a state of mental incapacity, it might, on motion, be taken off the file.§

* *Woolfreys v. Woolfreys*, Rolls, Feb. 7, 1824.

† Mitf., 153.

‡ See s. 7 of the present Act, and the note thereto, *supra*. Since that section was passed, the lamented death has occurred of Lord Justice Mellish. The Queen, by her sign manual, has authorised all the Lords Justices of the Court of Appeal by name to exercise the jurisdiction in Lunacy.

§ *Wartualy v. Wartualy*, Jac., 377; *Blake v. Smith*, Younge, 596.

Order XVIII. A lunatic might have been made a defendant to a suit, but he must have defended by the committee of his estate, who, as well as the lunatic, was a necessary party to the suit. No order was required to enable the committee to defend; but the committee must have obtained the sanction of the Lord Chancellor, or of the Lords Justices, before defending, in the same manner, as before instituting a suit. Usually, the lunatic and his committee made a joint defence to the suit; but if it happened that a lunatic had no committee, or the committee was plaintiff, or had an adverse interest, an order had to be obtained, on motion of course, or on petition of course at the Rolls, supported by affidavit, appointing a *guardian* to defend the suit.*

Persons of unsound mind, not so found by inquisition, defended by guardian, who was appointed on an application by motion of course, or on petition of course in the Rolls, in the name of the person of unsound mind. The application must have been supported by affidavits proving the mental incapacity of the defendant,† the fitness of the proposed guardian, and that he had no adverse interest.‡

An appearance was entered on the defendant's behalf, and an order obtained for a guardian. If such order was not obtained, the plaintiff must have applied for an order by motion, notice of which had to be served pursuant to Order VII., Rule 3, of the Consolidated Orders. It was usual to appoint the solicitor to the Suitors' Fee Fund to be the guardian.

The Chancery Division has jurisdiction to give directions as to the guardianship and maintenance of a person of unsound mind, not so found by inquisition. It will not, however, exercise this jurisdiction, unless the property is small, and proceedings in lunacy are not intended to be taken.§

ORDER XIX.

PLEADING GENERALLY.

Rule 1.

The following Rules of pleading shall be substituted for those heretofore used in the High Court of Chancery and in the Courts of Common Law, Admiralty, and Probate.

This Rule is a re-enactment of the first part of Rule 18 of the Principal Act.

No mention, it will be perceived, is made of the Court for Divorce and Matrimonial Causes; by Order LXII., *infra*, it is provided that "nothing in these Rules shall affect the Practice of Procedure" in that Court.

See s. 100 of the Principal Act, *supra*, for the definition of "pleading."

* Mitf., 104; *Snell v. Hyat*, 1 Dick., 287; *Lady Hartland v. Atcherley*, 7 Beav., 53; *Watts v. McKenzie*, 3 M. and G., 363.

† *Simmons v. Bates*, 20 L. J., 270. ‡ *Piddocke v. Smith*, 9 Hare, 395.

§ *Fane v. Fane*, 2 Ch. D., 124; 45 L. J. (Ch.), 381; 34 L.T., 613 24 W. R., 602.

Rule 2.

Order **XX.**,
Rule 2.

Unless the defendant in an action at the time of his appearance shall state that he does not require the delivery of a statement of complaint,* the plaintiff shall within such time and in such manner as hereinafter prescribed, deliver to the defendant after his appearance a statement of his complaint and of the relief or remedy to which he claims to be entitled. The defendant shall within such time and in such manner as hereinafter prescribed deliver to the plaintiff a statement of his defence, set-off, or counterclaim (if any), and the plaintiff shall in like manner deliver a statement of his reply (if any) to such defence, set-off, or counterclaim. Such statements shall be as brief as the nature of the case will admit, and the Court in adjusting the costs of the action shall inquire, at the instance of any party, into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same.

This Rule is a re-enactment of the second part of Rule 18 of the Principal Act, "in such manner as hereinafter prescribed," being substituted for "in such manner as shall be prescribed by Rules of Court."

The form of Memorandum of Appearance given in Appendix (A), Part I., No. 6, contains the following intimation at the end of it:—"The said defendant requires (or does not require) a statement of complaint to be filed and delivered."

"Within such time and in such manner as hereinafter prescribed," namely, in Orders XXI. and XXII., *infra*.

"Set-off" or "counterclaim." See Rule 3 of this Order, *infra*, and s. 24, subs. (3) of the Principal Act, *supra*. The counterclaim must state the facts on which the defendant relies, they cannot be inferred from the statement of claim. *Holloway v. York*,† *Crowe v. Barnicot*.‡

By Order II., Rule 2, *supra*, the use of prolix writs and indorsments of claim is to be visited with costs, in the same manner as prolix statements of claim and of defence, reply, set-off, and counterclaim, under this Rule. The Judicature Commission§ adduced prolixity as the cardinal sin of Chancery pleadings:—"Equity pleadings commonly take the form of a prolix narrative of the facts relied upon by the party, with copies of extracts of deeds, correspondence and other documents and other particulars of evidence set forth at needless length." By the Rules of the Supreme Court (Costs),|| "the Court or the Judge may, at the hearing of

* See *Hooper v. Giles*, 1 Charley's Cases (Chambers), 68.

† 25 W. R., 627; W.N., 1877, p. 112.

‡ W.N., 1877, p. 178.

§ First Report, p. 11.

|| General Provisions, sect. 18.

**Order XIX.,
Rule 2.**

any cause or matter, or upon any application or procedure in any cause or matter in Court or at chambers, and whether the same is objected to or not, direct the costs of any pleadings, or any part thereof, which contains unnecessary matter or is *of unnecessary length*, to be disallowed, or may direct the taxing master to look into the same, and to disallow the same, and in any case where such question shall not have been raised before and dealt with by the Court or Judge, the taxing officer may look into the same for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so."* See, also, Rule 24 of this Order, *infra*.

In the case of *Bull v. The West London School District Board*, which was commenced under the old procedure, John Balstone and Josiah Hunt were made defendants, merely for the purpose of obtaining discovery from them. No case was made against them, and no decree was asked for against them. Balstone and Hunt, although they were partners in business, when they were made parties, and when they put in their answers, appeared by *separate solicitors* and put in separate answers. Prior to the hearing they dissolved partnership. At the hearing they appeared by separate Counsel. Malins, V.C., held that they were not justified in appearing by separate solicitors and putting in separate answers, and that they could, therefore, only have *one set of costs*, which must be paid by the plaintiffs up to the hearing. His Lordship considered that they were not necessary parties to the suit, but he refused an application to dismiss them at that stage of the proceedings, as further discovery was required of them by the plaintiffs.†

"A statement of his reply." A plaintiff may reply specially, by way of confession and avoidance, and may also join issue, generally, at the same time. See Form 4, Appendix (C), and *Hall v. Eve*.‡

Rule 3.

A defendant in an action may set-off, or set up by way of counterclaim, against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a statement of claim in a cross action,§ so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the

* See Chancery Order XI., Rules 9 & 10, and *Re Farington*, 33 Beav., 341.

† *Bull v. The West London School Board*, W. N., 1876, p. 209; 34 T., 674. See *Marsh v. The Mayor of Pontefract*, 1 Charley's Cases (Chambers), 66.

‡ 4. Ch. D., 341; 46 L. J. (Ch.), 145; 35 L. T., 735, 926; 25 W. R., 177. But see *Earp v. Henderson*, 3 Ch. D., 254; 45 L. J. (Ch.), 738; 34 L. T., 844; and *The London and St. Katherine Docks Company v. The Metropolitan Railway Company*, 35 L. T., 733; W. N., 1876, p. 272.

§ As to the meaning of this, see *Holloway v. York*, 25 W. R., 627; W. N., 1877, p. 112, and *Aitken v. Dunbar*, 46 L. J. (Ch.), 482.

Court as Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

Order XIX.,
Rule 3.

This Rule is a re-enactment of Rule 20 of the Principal Act, the words "in an action" being inserted after the words "a defendant," at the commencement of the Rule.

This Rule is copied (almost *verbatim*) from the following recommendation of the Judicature Commission:—"We think that a defendant, having a right or claim against a plaintiff with reference to the subject-matter of the suit, or arising out of the same transaction, which at present he cannot enforce without a separate or cross action or suit, should be at liberty to bring forward such right or claim in his answer, which in that case should have the same effect as if it were a declaration in a cross action or suit, so as to enable the Court or a Judge to pronounce a final judgment between the parties with respect both to the original and the cross demand. But a Judge should be empowered, on application by the plaintiff before trial, to refuse permission to allow such cross right or claim to be brought forward, if he shall be of opinion that it cannot conveniently be adjudicated upon in the case to be tried."*

The principle of this Rule is also embodied in subsection (3) of section 24 of the Principal Act, *supra*:—"The said Courts respectively and every Judge thereof shall have power to grant to any defendant in respect of any equitable estate or right or other matter in Equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff as the said Courts respectively, or any Judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff."

The framer of this subsection evidently had present to his mind the practice in Equity of filing cross bills. It frequently happened that a complete decree could not be made without a cross bill to bring the whole matter in dispute before the Court. A cross bill would even be directed to be filed by the Court itself at the hearing of the original suit, in order to bring the rights of all the parties fully and properly before it.

The object of the 3rd subsection of section 24 of the Principal Act and of the present Rule, is to give the parties all the advantages which would result from the filing of a cross bill, without involving the trouble and expense of filing it.

Where any defendant seeks to rely upon any facts as supporting a right of set-off or counterclaim, he must, in his statement of defence, state specifically that he does so by way of set-off or counterclaim.†

By Order XXII., Rule 5, where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, *along with any other person* or persons, he shall add to the title of his defence a further title similar to the title in the statement of claim, setting forth the names of all the persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver his defence to such of them as are parties to the action

* First Report of the Judicature Commission, pp. 11, 12.

† See the Forms of Pleadings in App. (C) to this Schedule, Nos. 10, 14, 24.

**Order XXII.,
Rule 3.**

within the period within which he is required to deliver it to the plaintiff. If any such person is not a party to the action, the defendant is, by Rule 6, to summon him to appear by serving him with a copy of the defence, indorsed in the Form No. 4 in App. (B) to this Schedule. The service of this copy of the defence is regulated by the same rules as the service of the writ of summons, and by Rule 7 the person served must appear as if served with a writ of summons. The person named as a party to the counterclaim, whether a party to the action or not, has a right to reply. (Rule 8.)

By Rule 9, the plaintiff, or any other person named as a party to a counterclaim, may apply to the Court or a Judge for an order that the counterclaim may be excluded, and that the claim thereby raised be disposed of in an independent action. The Court or Judge may make such order thereupon "as shall be just."

The case of *Padwick v. Scott** affords a useful illustration of the success of an application under Order XXII., Rule 9, to exclude counterclaims on the ground that they were not sufficiently connected with the original subject-matter of the action, and were calculated unduly to embarrass and delay the plaintiff.

It is not sufficient for a plaintiff in his reply to deny generally the facts alleged by way of counterclaim: he must deal specifically with each allegation of fact, of which he does not admit the truth. Rule 20 of this Order, *infra*.

Where in any action a set-off or counterclaim is established, as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge the defendant such relief as he may be entitled to. Order XXII., Rule 10. See *Rolfe v. Maclaren*.†

In the case of *Newell v. The Provincial Bank of England*‡ a question upon the decision of the Common Pleas Division arose, which shows that the technical definition of a "set-off," which is as old as the year 1726, still flourishes. That Rule is as follows:—"Where there are *mutual debts* between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are *mutual debts* between the testator or intestate and either party, one debt may be set against the other."§ In *Newell v. The Provincial Bank of England*, the administrator of an intestate sued the intestate's bankers for £80. 7s. 3d., being the balance due to the intestate by the defendants at the date of the intestate's death—which was the 9th of August, 1875. The defendants attempted to set up a counterclaim for £1,000, alleged by them to be due to them by the plaintiff as administrator of the deceased, on a joint and several promissory note given by the intestate and others to the defendants on the 21st of April, 1875, and which fell due on the 24th of August, 1875. Reply 1. The promissory note did not become due till after the decease of the intestate. 2. On the 2nd of November, 1875, the Chancery Division made an order to take an account of the debts of the intestate, and gave the defendants notice, before this action was brought, that their

* 2 Ch. D., 736; 45 L. J. (Ch.), 350; 24 W. R., 723. See also *Lee v. Collyer*, 1 Charley's Cases (Chambers), 86; and *Nicholson v. Jackson*, 2 Charley's Cases (Chambers), 37.

† 3 Ch., D., 106; 24 W. R., 816.

‡ 1 C. P. D., 496; 45 L. J. (C.P.), 285; 34 L. T., 533; 24 W. R., 458.

§ 2 Geo. II. c. 22, s. 13. The rest of the Act has been repealed. See the Revised Edition of the Statutes, vol. ii. p. 361.

claim on the promissory note would be adjudicated on in due course. 3. Under sec. 14 of the 23 & 24 Vict. c. 38, any proceedings at law by the present defendants might, and would, have been restrained until the account was taken. Demurrer. The Common Pleas Division overruled the demurrer, and ordered judgment to be signed for the plaintiff, all further proceeding in the action by the defendants being stayed. Under the old system of procedure, the defendants could not have set-off the £1,000, either at law or in equity, in consequence of the 2 Geo. II. c. 22, s. 13, already cited: and therefore the defendants could not set up the £1,000, by way of counterclaim, under the new system of procedure. "The plaintiff's claim," said Brett, J., "is a claim by the administrator of a deceased person for a debt due to the intestate *in his lifetime*. The claim, which is set up in opposition to that, is in respect of a debt which accrued to the estate *after the death of the intestate*."

Order XIX.,
Rule 3.

The direction that all proceedings by the defendants in the action should be stayed was substituted in this case for the former practice, under sec. 14 of the 23 and 24 Vict. c. 38, of restraining the action at law, through the intervention of the Court of Chancery.*

It is evident that if the order of the Chancery Division had not been made, and the intestate had died on the 25th, instead of the 9th of August, 1875, the judgment would have been that the plaintiff should pay the defendants £919. 12s. 9d.!

In an action by the executor, previously to the decision in this case, against the deceased's bankers for money due, Huddleston, B., at chambers, had refused to strike out a counterclaim in respect of an overdue promissory note of the deceased held by the defendants. The promissory note was described as "now overdue," but it does not appear whether it became due in the testator's lifetime.†

Supposing a counterclaim to show a right to some damages, but that it is obvious that the amount of such damages would not be equal to the amount of the claim to which it is pleaded, would the counterclaim be demurrable? If it is to be treated as a set-off under the old system, it is clear that it would, for a plea of set-off pleaded to the whole of the claim alleged that the set-off was of an amount equal to the claim. The present Rule, however, shows that a counterclaim is not like a plea of set-off, for by the present Rule the counterclaim is to have the same effect as a statement of claim in a cross action. The meaning seems to be that, where there is a claim and a counterclaim, the effect is to be similar to the effect under the old system, where the parties agreed that cross actions should be tried together, and judgments having been given, there should be *execution* only for the balance of one judgment over the other, except that, under the new system, the *judgment* is to be only for the balance of one judgment over the other.‡ If so, the counterclaim is good if it shows a right to any amount of damages whatever, and no question (in law) arises as to whether the amount of the counterclaim equals the amount of the claim. Therefore, when there is a demurrer to the whole statement of defence, if such statement shows a good counterclaim for any amount, the demurrer must fail and the statement of defence stand good.§

* See s. 24, subs. (5) of the Principal Act, *supra*.

† *Wavell v. The National Provincial Bank of England*, 1 Charley's Cases (Chambers), 82.

‡ See *Staples v. Young*, 2 Ex. D., 324.

§ *Mostyn v. The West Mostyn Coal and Iron Company, Limited*, 1 C. P. D., 145; 45 L. J. (C.P.), 401; 34 L. T., 325; 24 W. R., 401; 2 Charley's Cases (Court), 43; per Brett, J.

**Order XIX,
Rule 3.**

Leave was given by Denman, J., at chambers, in an action for work done, commenced before the 1st of November, 1875, to deliver a counterclaim in lieu of pleading a set-off, both parties consenting.*

Leave was given, in an action commenced before the 1st of November, 1875, by Vice-Chancellor Hall, on motion in Court, to a defendant to treat an answer as a counterclaim, the order being so framed as to enable the plaintiff to amend, and leave being reserved to the plaintiff to apply, in case of any difficulty arising out of the order.†

The effect of allowing the defendant to set up a counterclaim is to convert two actions into one, and Lush, J., at chambers, directed this new procedure to be adopted in actions commenced before the 1st of November, 1875, wherever the defendant's affidavits disclosed *bonâ fide* grounds for a cross action.‡ The action in the case before him was for the price of goods sold, the counterclaim was for breach of contract, in delivering goods of a quality inferior to that stipulated for.

The defendant was allowed by Lush, J., at chambers, to set up a counterclaim, in respect of the inferiority of iron, in an action for the price of the iron, commenced before the 1st of November, 1875.§

In an action brought to recover rent, under a deed of underlease, in which the declaration had been delivered before the 1st of November, 1875, the new procedure was ordered (by Lush, J., at chambers) to be adopted, on an affidavit that the defendant had a cross claim with regard to a breach of covenant in the underlease. The declaration was, at the same time, allowed to stand as a statement of claim.||

Leave to set up a counterclaim for extras due to the defendant beyond the contract price was granted by Lush, J., at chambers, in an action commenced before the 1st of November, 1875, by a foreign corporation for damages for negligently constructing a ship. When there is a difficulty in serving a writ in a cross-action, leave to set up a counterclaim will be the more readily given.¶

The defendant, in an action for goods sold and delivered, commenced before the 1st of November, 1875, was allowed by Lush, J., at chambers, to add, subsequently to issue joined, a counterclaim, founded on fraudulent representation as to the nature of the goods sold and delivered.**

In an action for the price of shares on application to set up a counterclaim for fraudulent representation as to the value of the shares was granted by Lush, J., at chambers.††

In an action to recover the balance of money due on the sale of a public-house, the defendant was permitted by Archibald, J., at chambers, to set up a counterclaim for the return of money paid as a deposit, on false representations made by the plaintiff's agent to the defendant, and to join the agent as co-defendant to the counterclaim.‡‡

In an action on a charty-party, commenced before the 1st of November,

* *Fowler v. Lee*, 2 Charley's Cases (Chambers), 31.

† *Crédit Foncier Company of England v. Adair*, W. N., 1876, p. 16.

‡ 1 Charley's Cases (Chambers), 70.

§ 1 Charley's Cases (Chambers), 73.

|| *Atkinson v. Ellison*, 1 Charley's Cases (Chambers), 69.

¶ *The Trinacria Steam Navigation Company v. Richardson*, 1 Charley's Cases (Chambers), 74.

** *Evans v. Gan*, 1 Charley's Cases (Chambers), 70.

†† 1 Charley's Cases (Chambers), 73.

‡‡ *Bartholomew v. Rawlings*, 2 Charley's Cases (Chambers), 32.

1875, the defendant was allowed, by Quain, J., at chambers, on affidavit to set up a counterclaim for damages for short delivery and injury to the cargo, the plaintiff having a week to consider whether he would discontinue the action, the defendant paying all the costs. Setting up a counterclaim not pleadable when the action was begun is like pleading a plea *puis darrein continuance*.*

In an action by a builder for moneys due to him the defendant was allowed by Quain, J., at chambers, to set up a counterclaim for breaches, by the plaintiff, of covenants contained in the building contract, the plaintiff having a week to consider whether he would discontinue the action, the defendant paying the costs.†

In an action for the price of timber, commenced before the 1st of November, 1875, the defendant was allowed by Quain J., at chambers, to set up a counterclaim for insufficient delivery in respect of other cargoes already paid for. The judge may strike out such a counterclaim after it has been set up, if he then thinks it ought not to be allowed.‡

In an action for the price of coals, commenced before the 1st of November, 1875, the defendant was allowed to set up a counterclaim for non-delivery of the balance of the coals.§

In an action for rent under a written agreement, Lindley, J., at chambers, refused to strike out a counterclaim for damages in respect of the non-performance of conditions in the agreement, and for specific performance of an agreement to grant a lease.||

In the case of *Holmes v. Anderson*,¶ which was tried, at the Spring Assizes of 1876, at Stafford, the defendant set up a claim for specific performance of an agreement to grant a lease, by way of counterclaim to an action of ejectment. After part of the plaintiff's case had been heard, an arrangement was come to by which a lease of the premises was to be granted by the plaintiff to the defendant on terms, and a juror was then withdrawn. Mr. Baron Amphlett, who presided at the trial, observed that this was an illustration of the beneficial effects of the new Acts. Previously, the expensive Common Law action of ejectment would have been followed by a still more expensive Chancery Suit, with attendant delay. By the operation of the new Acts the Chancery Suit was now rendered unnecessary.

The defendant was allowed by Quain, J., at chambers, to set off a County Court judgment debt against a judgment-debt of the Court of Exchequer.**

The Crown was allowed by Lush, J., at chambers, to set up a counterclaim in a Petition of Right, commenced before the 1st of November, 1875.†† The claim in that case was for moneys alleged to be due by the Crown to the plaintiff, under an agreement to reward him for improvements in artillery, which he had invented. The counterclaim was for expenses in connection with experiments.

* 1 Charley's Cases (Chambers), 76.

† *Trevena v. Watts*, 1 Charley's Cases (Chambers), 79.

‡ *Cappeleus v. Brown*, 1 Charley's Cases (Chambers), 77.

§ *Norton Cannock Coal Company v. Merriman*, 1 Charley's Cases (Chambers), 80.

|| *Atwood v. Miller*, 1 Charley's Cases (Chambers), 82. See Appendix (C), No. 24.

¶ *Times*, Saturday, March 18th, 1877.

** *Sandys v. Lewis*, 1 Charley's Cases (Chambers), 81.

†† *Thomas v. The Queen*, 1 Charley's Cases (Chambers), 71.

Order XIX.,
Rule 3.

In an action for non-acceptance of a ship, commenced before the 1st of November, 1875, the defendant was only allowed by Lush, J., at chambers, to set up a counterclaim in respect of another ship deposited with the plaintiff, on giving security for the costs of a Chancery suit brought by the defendant against the plaintiff with regard to the second ship.*

In an action for goods sold and delivered, the defendant set up a counterclaim, alleging inferior quality. Lush, J., decided, at chambers, that the defendant must give particulars of the damages under the counterclaim, although the defendant alleged that the counterclaim contained sufficient particulars.†

In the following cases, at chambers, the counterclaim was disallowed:—

In an action against a stockbroker, a counterclaim for fraudulent representation, in respect of the shares, for the price of which he was being sued, was struck out, the defendant to plead under the old system.‡ The reason for this appears to have been that no affidavit was produced by the defendant.

In an action of trover by the trustees of a bankrupt against a banker, for bills of exchange sent from America by the bankrupt to the defendant, and appropriated by the defendant to the payment of a debt due to him by the bankrupt, Quain, J., inclined to the opinion (at chambers), that the defendant could not plead the debt as a set-off, he having proved for it under the bankruptcy in the American Courts: but his lordship referred the question to the Court.§

An application after issue joined, in an action for the price of a boiler, to set up a counterclaim for breach of a warranty, that the boiler should be "equal to the last," was held by Quain, J., at chambers, to be too late.||

Where in action on attorney's bills amounting to £80, commenced before the 1st of November, 1875, the defendant sought to set up a counterclaim for negligence, in a case involving £12, tried in 1871, the application was refused by Lush, J., at chambers.¶

A reply joining issue generally on a counterclaim, will not be ordered to be amended or struck out, as embarrassing, under Order XXVII., Rule 1, because it does not deal specifically with the allegations of the counterclaim.** Where the plaintiff proves a claim, and the defendant proves a counterclaim of less amount, the plaintiff receives judgment for the balance only.††

A counterclaim, founded on facts which have arisen since the action was brought, must be pleaded by leave, as a defence arising *puis darrein continuance*, under Order XX., Rule 2; so that the plaintiff may have an opportunity of confessing it under Order XX., Rule 3. If the counterclaim be not so pleaded, the plaintiff should take out a summons to strike it out.‡‡

No counterclaim can be set up which does not seek relief against the plaintiff. Per Jessel, M.R., in *Warner v. Twining*, §§ and *Furness v.*

* *Michael v. Corner*, 1 Charley's Cases (Chambers), 70.

† 1 Charley's Cases (Chambers), 75.

‡ *Lowther v. Bellairs*, 1 Charley's Cases (Chambers), 75.

§ *Seligman v. Huth*, 2 Charley's Cases (Chambers), 60. See *Phillips v. Allen*, 2 M. & R., 575; 8 B. & C., 477.

|| *Ware v. Gwynne*, 1 Charley's Cases (Chambers), 79.

¶ *Tennant v. Walton*, 1 Charley's Cases (Chambers), 72.

** *Rolfe v. McLaren*, 3 Ch. D., 106; 24 W. R., 816.

†† *Staples v. Young*, 2 Ex. D., 324.

‡‡ *Ellis v. Munson*, 36 L. T., 585; W. N., 1876, p. 253.

§§ 24 W. R., 356.

*Booth.** *Shepherd v. Beane*,† in which Hall, V.C., allowed a claim against a co-defendant, only, to be set up by way of counterclaim, is not an authority.‡

**Order XIX.,
Rule 3.**

When two or more plaintiffs sue for a joint claim, a defendant may set up two or more separate counterclaims against the respective plaintiffs.§

Rule 4.

Every pleading shall contain, as concisely as may be, a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraphs numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of Counsel shall not be necessary. Forms similar to those in Appendix (C) hereto may be used.

With the exception of Forms 28 and 29 of Appendix (C) to this Act, which are copied from Forms 1 and 2 of Schedule (C) to the Rules of Court of 1874, all the forms in Appendix (C) to this Act are new.

This Rule is copied from s. 10 of the Chancery Amendment Act, 1852,|| and assimilates the practice in the Common Law Divisions of the High Court to that of the Court of Chancery:—

“ Every Bill of Complaint shall contain as concisely as may be a narrative of the material facts, matters and circumstances on which the plaintiff relies, such narrative being divided into paragraphs numbered consecutively, and each paragraph containing, as nearly as may be, a separate and distinct statement or allegation.”

Where the old forms of pleadings will serve as models they are not necessarily abolished by the Supreme Court of Judicature Acts. In an action for money had and received for the plaintiff's use, the statement that the defendant received a sum of money for the plaintiff's use is all that can be required; the circumstances under which he received it need not be stated. Per Archibald, J., at Chambers.¶

By Rule 1 of Order XXVII., the Court or a Judge may order to be struck out or amended any matter in the statement of claim, statement of defence, or reply, which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action. This is a power which has been very freely used. A refusal, however, by a Judge to

* 4 Ch. D., 586; 46 L. J. (Ch.), 112; 25 W. R., 267.

† 2 Ch. D., 223; 45 L. J. (Ch.), 429; 24 W. R., 363.

‡ Per Hall, V. C., in *Harrie v. Gamble*, W. N., 1877, p. 142; 12 N.C., 133.

§ *Manchester, Sheffield, and Lindolnshire Railway Company, and London and North Western Railway Company v. Brooks*, 2 Ex. D., 243; 46 L. J. (Ex.), 244; 35 L. T., 103; 25 W. R., 413.

|| 15 & 16 Vict. c. 86.

¶ *Bartlett v. Roche*, 2 Charley's Cases (Chambers), 34.

Order XIX., Rule 4. strike out pleadings under Order XXVII., Rule 1, is an exercise of discretion, with which the Court of Appeal is very unwilling to interfere.*

"As concisely as may be." In an action against a company by the purchasers of the Company's bonds, for issuing a fraudulent prospectus, it is unnecessary for the statement of claim to set out the motives which led to the issuing of the prospectus or *the scheme* of which it was a part; it is sufficient for it to state, generally, that the prospectus was, to the knowledge of the defendants, fraudulent, without specifying the particulars.†

In an action of slander, particulars of the names and addresses of persons mentioned in the statement of claim, and who were passing in the street at the time the slander was uttered, and of the damages occasioned by the plaintiff's business falling off, were refused by Denman, J., at chambers.‡

Particulars of what passed in a conversation referred to in the statement of defence were refused at chambers, as immaterial, in an action of slander.§

"A statement of the material facts." There should be no *rhetoric* introduced into a statement of claim, although it may be necessary to set out the facts at some length.||

A statement of claim should not contain anything corresponding to "the *charging part*" of a bill in Chancery, which was merely the pleader's views of the equity.¶

Whenever the pleadings show that there is a mistake on the face of an instrument in writing on which the action is founded, as, *e.g.* the insertion of the name of a third party instead of that of the plaintiff in a charter-party on which the plaintiff is suing, a Common Law Division will treat the instrument as rectified, although neither of the parties has applied to have it rectified. "There is no need to go through the manual labour of drawing the pen through the words erroneously inserted; the Court will consider that as done, as soon as it is proved that it ought to be done."** (The defendant, in this case, vainly contended that there was a "variance" in the plaintiff's pleadings, because he declared in his own name on a contract in which he admitted in his reply that his name did not appear.)

"But not the evidence." Three paragraphs in a statement of claim,

* See, *e.g.* *Watson v. Rodwell*, 3 Ch. D., 380; 45 L. J. (Ch.), 744; 35 L. T., 86; 24 W. R., 1009.

† *Herring v. Bischoffsheim*, W. N., 1876, p. 77; per Jessel, M. R.

‡ *Wingard v. Cox*, 2 Charley's Cases (Chambers), 33.

§ *Colonial Assurance Corporation, Limited, v. Prosser*, 2 Charley's Cases (Chambers), 35.

|| Per Mellish, L. J., in *Watson v. Rodwell*, 3 Ch. D., 380; 45 L. J. (Ch.), 744; 35 L. T., 86; 24 W. R., 1009. ¶ *Ib.*

** Per Brett, J., in *Breslauer v. Barwick*, 24 W. R., 901. His lordship followed the precedent set by himself in *Mostyn v. The West Mostyn Coal and Iron Company*, 1 C. P. D., 145; 45 L. J. (C. P.), 401; 34 L. T., 325; 24 W. R., 401; 2 Charley's Cases (Court), 43; where, however, the defendant applied, in his counterclaim, to have the instrument rectified. "Although *this Division*," said Brett, J., in that case, "cannot reform the instrument with regard to its effect in the future, it may, for the purpose of determining the action, treat it as set aside."

containing evidence, were struck out, at chambers, as involving an infringement of this provision in the present Rule.*

Order XIX.,
Rule 4.

"Dates, sums, and numbers shall be expressed in figures, and not in words." See the Consolidated Orders of the Court of Chancery, Order IX., Rule 3 :—"Dates and sums occurring in Bills shall be expressed in figures and not in words." By the Chancery Funds Rules, 1874, however, "sums occurring in the body of every order which is to be acted on by the Chancery Paymaster shall be expressed *in words*." Vice-Chancellor Hall has decided† that sums occurring in the body of an affidavit filed by a trustee, who pays money into Court under the Trustees Relief Act, 1847, must, as in the orders, be expressed *in words*. The Paymaster-General cannot act upon the affidavit, if the sums are expressed in figures.

"Signature of Counsel shall not be necessary." "This does not mean that the signature of Counsel is improper, and ought to be struck out." Per Malins, V.C., in *Bernard v. Hardwick*.‡ Both in that case and in the previous case of *Duckitt v. Jones*,§ Vice-Chancellor Malins expressed his opinion that it was "most desirable" that "all statements of claim should be signed by Counsel," "as a guarantee that nothing of an objectionable character is contained in them."

The Common Law, not the Chancery Practice, is followed in the provision of this Rule as to the signature of Counsel. By sect. 85 of the Common Law Procedure Act it is provided that "the signature of Counsel shall not be required to any pleading." By Order VIII., Rule 1, of the Consolidated Orders of the Court of Chancery it is, on the other hand, provided that "the Clerks of Records and Writs shall not file any bill, exceptions, demurrer, plea, answer, or disclaimer, unless the same be signed by Counsel"—a rule as old as the time of Henry V. A Bill in Chancery not signed by Counsel was demurrable.||

"Appendix (C)." The note to Form No. 9 of Appendix (C), "the facts stated in *this* reply should, in general, be introduced by amendment of the statement of claim," refers only to Form 9, and is not intended to hinder a plaintiff in suitable cases from replying specially. Order XXIV., Rule 2, shows that a reply may contain something which may render a rejoinder necessary.¶ A rejoinder, however, will not be allowed where it would amount to pleading evidence under this Rule.**

Rule 5.

Every pleading which shall contain less than *three* folios of seventy-two words each (every figure being counted as one word), may be either printed or written, or partly

* 1 Charley's Cases (Chambers), 83.

† *In re Isabella Watts' Will and In Re The Trustees' Relief Act*, 24 W.R., 701.

‡ W. N., 1876, p. 134.

§ 33 L. T., 777; W. N., 1876, p. 17.

|| *Kirkley v. Burton*, 3 Madd., 378.

¶ *Hall v. Eve*, 4 Ch. D., 341; 46 L. J. (Ch.), 145; 25 W. R., 177; 35 L. T., 735, 926, per Baggallay, L. J.

** *Norris v. Beazley*, 35 L. T., 845.

Order XIX., printed and partly written, and every other pleading, not
Rule 5. being a petition or summons, shall be printed.

“Ten” is now substituted for “three” folios. See Rule 5a, *infra*.

As to printing, see Order LVI., Rule 2, and the Rules of the Supreme Court (Costs), Orders I. to V., *infra*.

By Order V., Rule 5, *supra*, “writs of summons shall be written or printed, or partly written and partly printed.”

The introduction of printing into the new system is borrowed from the practice of the Court of Chancery, as, at Common Law, the pleadings were invariably written. The question of *length* is, of course, an important element in the case. Every pleading containing more than the prescribed number of folios (except a petition or summons) *must*, under the new practice, be printed. The rule as to printing was not so stringent even in the Court of Chancery. The Bill and Answer had to be printed, irrespective of the length; but interrogatories were not required to be printed, nor, it is conceived, pleas, except when a joint plea and answer were put in.

Mr. Justice Lush, at chambers, in November, 1875, decided that an affidavit containing more than three folios might be filed without printing, by leave of the Judge.*

Rule 5a.

In Order XIX., Rule 5, of the Rules of the Supreme Court, the word “ten” is hereby substituted for the word “three” before the word “folios.”

This new Rule was added by the Rules of the Supreme Court, June, 1876, on account of the inconvenience of the severe restriction imposed by Rule 5, which prevented the introduction into the pleadings of new matter, in writing, to an appreciable extent, on the spur of the moment.

Rule 6.

Every pleading or other document requiring to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party, then such pleading or document shall be delivered† by being filed with the proper officer.

Where the plaintiff sued by a solicitor and where the defendant had appeared by a solicitor, all notices, summonses, orders, rules, pleadings, and other proceedings must have been delivered to the solicitor (or his

* 1 Charley's Cases (Chambers), 83. † *Manton v. Metcalf*, 38 L. T., 683.

agent if it was a country cause), and not to the party himself, so long as the solicitor's authority continued.* Where a party sued or defend in person, the service must have been made on him.†

**Order XIX.,
Rule 6.**

"The manner now in use." When the service is on a solicitor, a copy of the proceedings should be left at his office with some person resident at or belonging to the same.‡ Service at the chambers of a solicitor on his laundress will not suffice, unless she acts as his servant, and the affidavit of service state that fact, and the deponent's belief of it. Putting a copy of a rule under the door of the solicitor's chambers or place of business,§ or into a letter box,|| unless there is a notice requesting papers, &c., to be so left, is insufficient.¶

"The manner now in use" of delivering pleadings where the party sues and defends in person is prescribed by Rule 166 of the Reg. Gen., Hil. T., 1853. Pleadings must be delivered at the "address for service." The rule does not state, however, to whom the pleadings may be delivered. Delivery to the party's mother,** sister,†† or female relation stopping at his residence‡‡ is sufficient. A mode of delivery, which would not suffice in the case of delivery to the solicitor will not suffice where the party sues or defends in person.§§

"Filed." This is the course prescribed by section 28 of the Common Law Procedure Act, 1852, in the case of a declaration, in default of appearance.

All pleadings in the Court of Chancery, whether bills, answers, pleas, demurrers, or replications, were filed with the Clerks of Records and Writs; but by Rule 9 of Order III. of the Consolidated Orders of that Court, "where any solicitor or party causes an answer, demurrer, pleas, or replication to be filed, he shall, on the same day, give notice thereof to the solicitor of the adverse party, or to the adverse party himself, if he acts in person."

Claims raised by a defendant against a co-defendant are to be delivered to the plaintiff and the co-defendant.||||

In *Cook v. Dey*,¶¶ Hall, V.C., expressed an opinion that notice of motion for judgment could not be sufficiently delivered in case of non-appearance by merely filing it under this Rule. Sir George Jessel, M.R., however, in *Dymond v. Croft*,*** decided that it could; and the Court of Appeal in *Morton v. Miller*,††† upheld this view. Malins, V.C., in *Williams v. Cardwell*,‡‡‡ followed it.

It is not necessary to file under this Rule a summons which has been personally served on a defendant who has not appeared.§§§

* *Tashburn v. Havelock*, Barnes, 306. † Archbold's Practice, 165, 166.

‡ *Kent v. Jones*, 3 Dowl., 210. *Smith v. Spurr*, 2 Dowl., 281.

§ *Stratton v. Hawkes*, 3 Dowl., 25.

|| *Braham v. Sawyer*, 1 D. and L., 466.

¶ *Warren v. Thompson*, 2 Dowl., N.S., 224.

** *Warren v. Smith*, 2 Dowl., 216.

†† *Archer v. Evans*, 1 Dowl., N.S., 861.

‡‡ *Weedon v. Lipman*, 9 Dowl., 111. §§ Archbold's Practice, p. 167.

|||| *Shepherd v. Beane*, 2 Ch. D., 223; 45 L. J. (Ch.), 429; 24 W.R., 167.

¶¶ 2 Ch. D., 218; 45 L. J. (Ch.), 611; 24 W. R., 262.

*** 3 Ch. D., 512; 45 L. J. (Ch.), 612; 35 L. T., 27; 24 W. R., 700.

††† 3 Ch. D., 516; 45 L. J. (Ch.), 613; 24 W. R., 723.

‡‡‡ 25 W. R., 646; W. N., 1877, p. 140.

§§§ *Whitaker v. Thurston*, W. N., 1876, p. 232.

Order XIX.,
Rule 7.

Rule 7.

Every pleading in an action shall be delivered between parties, and shall be marked on the face with the date of the day on which it is delivered, and with the reference to the letter and number of the action, the Division to which and the Judge (if any) to whom the action is assigned, the title of the action, the description of the pleading, and the name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor.

“The date of the day.” “The letter and number of the action.” The date of the filing of every pleading must have been written or printed on the first page of the pleading, in the Court of Chancery, and must also have been entered in the books of the Clerks of Records and Writs.* The letter and the number by which the cause was distinguished in the Cause Book must also have been written or stamped on the first page.† The symbols used were placed on the first page either at the top or on the left-hand margin, near the top. See the forms given by Mr. Daniel, pp. 154, 531, &c., and the forms in the Appendix (C), *infra*, which, it will be seen, are *mutatis mutandis*, a copy of the forms in Chancery.

The statement of claim must be delivered “within six weeks from the time of the defendant’s entering an appearance;”‡ the statement of defence, “within eight days from the delivery of the statement of claim;”§ the reply, “within three weeks after the defence, or the last of the defences, shall have been delivered.”|| A demurrer must, if it is a demurrer to a statement of claim, be delivered within eight days from the delivery of the statement of claim; within three weeks after the defence, if it is a demurrer to the statement of defence.¶ These intervals may, however, be enlarged or abridged.** The time of the Long Vacation is not reckoned in the computation of the times appointed or allowed for delivering any pleading, unless it be otherwise directed.††

By Order V., Rule 8, *supra*, “The action shall be distinguished by the date of the year, a letter, and a number, in the same manner in which causes” were “distinguished in the Cause Books.” See the note to that Rule, *supra*.

By Rule 8a (Rules of the Supreme Court, June, 1876) “when” the “action shall be commenced in a District Registry, it shall be further distinguished by the name of the Registry.” The usual heading of an action commenced in a District Registry is:—

“1877. [A] No. [1]

“In the High Court of Justice.

“[Queen’s Bench] Division.

“[Manchester] District Registry.”

* Chancery Order I., Rules 45, 47, and 48.

† Thus “A., No. 50.” See the Forms in Appendix (C), *infra*.

‡ Order XXI., Rule 1.

§ Order XXII., Rule 1.

|| Order XXIV., Rule 1.

¶ Order XXVIII., Rule 3.

** Order LVII., Rule 6.

†† *Ibid.*, Rule 5.

It will be perceived that nothing at all is said in this Rule about filing pleadings. By Rule 29, however, of this Order, *infra*, "where an action proceeds in a District Registry, all pleadings required to be filed shall be filed in the District Registry." The only case in which pleadings are "required to be filed" under these Rules is under Rule 6 of the present Order, *supra*: "If no appearance has been entered for any party, every pleading shall be delivered by being filed." (See the note to that Rule, *supra*).

Order XIX.,
Rule 7.

Rule 8.

Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief. And the same rule shall apply to any counterclaim made, or relief claimed by the defendant, in his statement of defence. If the plaintiff's claim be for discovery only, the statement of claim shall show it.

The first clause of this Rule is copied from s. 10 of the Chancery Amendment Act, 1852:—"Every Bill of complaint shall pray specifically for the relief which the plaintiff may conceive himself entitled to, and also for general relief." Before that enactment it was not absolutely necessary for the plaintiff in a Court of Chancery to "pray specifically for relief," praying for "general relief" was sufficient.*

"State specifically." If a counterclaim does not ask for alternative or general relief, it must be taken that the defendant does not want it. Per Jessel, M.R., in *Holloway v. York*.†

"Discovery." "Every Bill may be a Bill of Discovery." (Daniel's Chancery Practice, 1408.) A Bill of discovery, however, in a Court of Chancery was commonly used in aid of the jurisdiction of some other Court. Of course it will be no longer necessary in aid of an action at law.

See, further, as to discovery, Order XXXI., *infra*.

Semble, it is unnecessary to bring an action for discovery only against a person from whom the discovery may be obtained by making him a party to an action pending.‡

A paragraph in a statement of defence, setting out matters which were alleged to be equivalent to a release from an agreement, was struck out under Order XXVII., Rule 1, on the ground that the defendant should have demurred.§

In an action for malicious prosecution, paragraphs in the statement of claim, that set out facts which the plaintiff said did not amount to reason-

* *Cook v. Martyn*, 2 Atk., 3; *Grimes v. French*, 2 Atk., 141: and see *Partridge v. Haycroft*, 11 Ves., 574.

† 2 Ex. D., 333, 25 W. R., 627.

‡ *Ainsworth v. Starkie*, 1 Charley's Cases (Chambers), 84.

§ *Menhinnick v. Turner*, 1 Charley's Cases (Chambers), 42.

498. SUPREME COURT OF JUDICATURE ACT, 1875.

Order XIX., Rule 8. able and probable cause, were struck out by Archibald, J., at chambers, under Order XXVII., Rule 1. 'The plaintiff should simply have stated that there was no reasonable or probable cause.* See Rule 25, *infra*.

The plaintiff is not entitled to plead in his statement of claim that the point in dispute has been admitted by the defendants in letters to the plaintiff's solicitors.†

A paragraph in a statement of claim, alleging that the plaintiff was "so informed" by the defendant, was struck out under Order XXVII., Rule 1, as embarrassing and improper. But the plaintiff might have stated *as a fact* the matter of which he alleged that he was "so informed."‡

There are many cases in which facts and evidence are so mixed up as to be almost undistinguishable.§

Rule 9.

Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly. And the same Rule shall apply where the defendant relies upon several distinct grounds of defence, set-off, or counterclaim founded upon separate and distinct facts.

This Rule would seem to modify, if not to abrogate, the rule of Equity, that two or more distinct subjects cannot be embraced in the same suit, the offence against which was termed "multifariousness," and rendered a bill liable to demurrer.|| But see Order XVII., *supra*.

Where applicable, inconsistent pleas may still be employed as under the old system of pleading. In action for money lent which came before Lindley, J., at chambers, the plaintiff pleaded four distinct inconsistent pleas:—First, that the plaintiff never lent him the money; secondly, that, if he did lend the money to anybody, it was to somebody else; thirdly, that the defendant had paid the money; and fourthly, that the plaintiff had released the defendant. Mr. Justice Lindley said:—"Where the old form of pleading is applicable, there is no objection to it. A defendant is entitled to say that he never was lent the money, and that, if he was, he has paid it, or been released," and his lordship refused to strike out the statement of defence under Order XXVII., Rule 1.¶

In an action of slander, a defendant may plead together defences equivalent to "not guilty" and a plea in justification.**

v
* *Aderis v. Thrigley*, 2 Charley's Cases (Chambers), 43.
† *Askew v. The North Eastern Railway Company*, 1 Charley's Cases (Chambers), 90. (Per Quain, J.)
‡ *Jones v. Turner*, 1 Charley's Cases (Chambers) 91.
§ Per Archibald, J., in *Smith v. West*, at Chambers, 2 Charley's Cases (Chambers), 41.
|| See Daniel's Chancery Practice, p. 283.
¶ *Barnicott v. Hann and Cross*, 2 Charley's Cases (Chambers), 39.
** *Restell v. Steward*, 1 Charley's Cases (Chambers), 89. (Per Quain, J.)

Rule 10.

Order XIX.,
Rule 10.

Where any defendant seeks to rely upon any facts as supporting a right of set-off or counterclaim, he shall, in his statement of defence, state specifically that he does so by way of set-off or counterclaim.

See Appendix (C), Nos. 10, 14 and 24, for illustrations of the Rule. "Rule 10 means that the counterclaim must contain *in itself* a specific statement of the facts upon which the defendant bases his claim to relief." Per Fry, J., in *Crowe v. Barnicot*.^{*} Under Rule 8, a set-off or counterclaim is to have the same effect as a statement of claim in a cross action, and it is therefore very important to the plaintiff that he should know positively what he is called upon to meet.

In *Hillman v. Mayhew*, Sir George Jessel, M.R., decided, that where a defendant headed his pleading as a "defence and counterclaim" under this Rule, but *pleaded no facts in support of his counterclaim*, the plaintiff was entitled, under Rule 21 of this Order, to join issue generally on "the defence and counterclaim" of the defendant, and that Rule 20 of this Order, which requires a specific traverse of "the facts alleged in a defence by way of counterclaim," did not apply.[†]

But even if the facts are stated in the counterclaim, the compliance by the defendant with the present Rule does not give him any absolute right to have the plaintiff's reply struck out as embarrassing, because it joins issue generally under Rule 21 of this Order, and does not specifically traverse the facts stated in the counterclaim pursuant to Rule 20 of this Order.[‡]

To an action by a company on a promissory note, the defendant pleaded, by way of set-off and counterclaim, a payment in respect of scrip in the company. Archibald, J., at chambers, held that the defendant shewed a claim merely to shares and not to money, and that this portion of the defence must be struck out or amended.[§]

For an instance of a demurrer to a counterclaim being allowed, on the ground that it showed no cause of action against a third party made a defendant to it, see *Child v. Stenning*, *Stenning v. Child*.||

Rule 11.

If either party wishes to deny the right of any other party to claim as || executor, or as trustee, whether in bank-

^{*} 25 W. R., 789; W. N., 1877, p. 178. See *Holloway v. York*, 2 Ex. D., 333; 25 W. R., 627.

[†] *Hillman v. Mayhew*, 24 W. R., 485. See the note to Rule 20 of this Order, *infra*.

[‡] *Rolfe v. Maclaren*, 3 Ch. D., 106; 24 W. R., 816.

[§] *The Cadogan Advance Company, Limited, v. Shepherd*, 1 Charley's Cases (Chambers), 44.

|| W. N., 1877, p. 66; 36 L. T., 426; 25 W. R., 519.

¶ For forms of indorsements of the "character of parties," see Appendix (A), Part II., section 8.

**Order XIX.,
Rule 11.**

ruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically.

By Rule 5 of the Reg. Gen., Trin. T., 1853, it is provided that in all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered in issue, *unless specially denied*. Under the old Common Law practice it was not necessary to state the character in which the executor, &c., sued or was sued. By Order III., Rule 4, *supra*, if the plaintiff sues or the defendant is sued in a representative capacity, the indorsement of claim on the writ of summons is to show in what capacity the plaintiff sues or the defendant is sued. By Order XVI., Rule 9, *supra*, where there are numerous parties having the same interest, one or more of the parties may sue or be sued, or defend on behalf of all the parties so interested. The question of suing or being sued in a representative capacity, therefore, is of more importance under the new than under the old practice.

As to the "alleged constitution of a partnership firm," see Order III., Rule 8; Order VII., Rule 2; Order IX., Rule 6 and Rule 6a; Order XII., Rule 12; and Order XVI., Rule 10 and Rule 10a, *supra*; and Order XLII., Rule 8, *infra*.

Rule 12.

In Probate actions* where the plaintiff disputes the interest of the defendant, he shall allege in his statement of claim that he denies the defendant's interest.

"Probate actions" include (Order LXIII.) "actions and other matters relating to the grant or recall of probate or of letters of administration other than 'common form' business."

"Interest causes" in the Court of Probate are administration suits where the right of a person applying for probate is contested on the ground of his having no interest in the estate of the deceased, either by reason of his not being related to the deceased at all, or by reason of his not being related to him in so near a degree as to entitle him in distribution to a share in the estate. These suits are conducted by declaration and plea.

By Rule 61 of the Rules of the Court of Probate in contentious business it is provided that "in interest causes each party shall be at liberty to deny the interest of the other."

Sir J. Hannen † has pointed out that this Rule "only carries out the old practice, ‡ its object being not only to bring all the parties before the Court, but to have all questions settled with the least possible expense."

* See, as to "Probate actions," Order V., Rules 1 and 10; Order XII., Rules 2 and 16; Order XIII., Rule 9; Order XVI., Rule 12; Order XIX., Rule 1, *supra*; and Order XXI., Rule 2; Order XXII., Rule 11, and Order XXIX., Rule 9, *infra*, &c.

† In *Medcalf v. James*, 25 W. R., 63.

‡ See section 18 of the present Act.

The plaintiff in a Probate action who wishes to put the defendant on proof of his interest under this Rule, *must allege want of interest in the defendant in the statement of claim.* When the statement of claim does not deny the defendant's interest, the statement of defence will not be struck out for not alleging an interest in the defendant under the present Rule. The plaintiff, however, will be allowed to amend his statement of claim by denying in it the defendant's interest.*

**Order XIX,
Rule 12.**

Rule 13.

No plea or defence shall be pleaded in abatement.

Pleas were formerly divided into dilatory and preemptory pleas, the best known kind of dilatory plea being a plea in abatement of non-joinder of necessary parties. Order XVI., Rule 13, *supra*, however, enables the Court or a Judge to add any party at any stage of the proceedings.

The Rule abolishes a class of pleas which, as pointed out by Dr. Broom,† “have been discouraged in modern times, as exhibiting a tendency, on the part of the defendant, to evade by technical objections the trial of the matter alleged against him.”

For an illustration of an ineffectual attempt to raise a *quasi* plea in abatement of the writ, notwithstanding this Rule, see *Preston v. Lomont*,‡ noted under Order II., Rule 4, *supra*.

Rule 14.

No new assignment shall hereafter be necessary or used. But everything which has heretofore been alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim.

The Rule abolishes a form of replication to which the plaintiff was obliged to resort to correct mistakes caused by the generality of the declaration, a quality which it derived from its adherence to the tenor of those simple and abstract *formulae*—original writs.§

The new assignment stated that the plaintiff proceeded for another cause of action than that stated in the plea, *e.g.*, for a trespass on a different spot, or for another promise or debt.||

In *Earp v. Henderson*,¶ Vice-Chancellor Bacon called attention to a Rule, analogous to the present one, laid down in a note to App. (C), No. 9, which is thus stated in the report in the *Law Times*:—“The facts stated in reply should in general be introduced by amendment into the

* *Medcalf v. James*, 25 W. R., 63.

† Commentaries on the Common Law, p. 171, edn. 1869. *Broadbent v. Ledcard*, 11 Ad. and E., 209.

‡ 1 Ex. D., 361; 24 W. R., 928; 34 L. T., 341; 2 Charley's Cases (Court), 185.

§ Stephen on Pleading, 7th edn., p. 199.

|| See the Forms in Bullen and Leake's Precedents of Pleading, 3rd edn., 653—657.

¶ 3 Ch. D., 354; 34 L. T., 844.

Order XIX., statement of claim. In *Hall v. Eve*,* however, Sir R. Baggallay, L.J.,
Rule 14. pointed out that the note is to the effect that "the facts stated in this
 reply (i.e., the reply in Precedent No. 9), should in general be introduced
 by amendment of the statement of claim." In *Hall v. Eve* the Court of
 Appeal overruled the decision in that case of Vice-Chancellor Bacon,
 that the plaintiff must amend his statement of claim, instead of replying
 specially. This is one of the most satisfactory decisions under the new
 Act, and shows the value of an Intermediate Court of Appeal. The
 principle of the present Rule, which is a most inconvenient one, is not to
 be extended.†

Rule 15.

No defendant in an action for the recovery of land§ who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession. And he may, nevertheless, rely upon any ground of defence which he can prove, except as hereinbefore mentioned.

Under s. 178 of the Common Law Procedure Act, 1852, there were no pleadings in ejectment. The consequence of this was that an equitable defence could not be set up in ejectment under s. 83 of the Common Law Procedure Act, 1854. A defendant who had only an equitable interest in the land, for the recovery of which the action was brought, could not invoke the assistance of a Court of Law.† The defendant was obliged to resort to the Court of Chancery to enforce by injunction his rights. Where a tenant, e.g., had contracted to purchase from the landlord the property of which he was in occupation, if the landlord took proceedings in ejectment, the tenant had still to resort to the Court of Chancery for an injunction to stay proceedings. This extraordinary state of things is happily amended by the present Rule.

* 4 Ch. D., 341; 46 L. J. (Cb.), 145; 25 W. R., 177; 35 L. T., 735, 926.

† See *The London and St. Katharine Docks Company v. The Metropolitan Railway Company*, 35 L. T., 733, the decision in which is probably wrong.

‡ As to actions for the recovery of land, see Order IX., Rule 8; Order XI., Rule 1; Order XII., Rules 18—22; Order XIII., Rules 7, 8; Order XVII., Rule 2, *supra*; and Order XXIX., Rules 7, 8; Order XLII., Rule 2, and Order XLVIII., *infra*.

§ *Neave v. Avery*, 16 C. B., 328.

Leave to set up an equitable defence under this Rule at the trial of an action of ejectment, commenced before the 1st of November, 1876, was refused by Bramwell, B.*

Order XIX.,
Rule 15.

Rule 16.

Nothing in these Rules contained shall affect the right of any defendant to plead "not guilty by statute." And every defence of "not guilty by statute" shall have the same effect as a plea of "not guilty by statute" has heretofore had, but if the defendant so plead, he shall not plead any other defence without leave of the Court or a Judge.

The plea of "not guilty by statute" puts in issue not only the defences peculiar to the statute, but also all the defences which were admissible under the general issue at Common Law.†

By Reg. Gen., Trin T., 1853, Rule 21, the defendant who pleads this plea must insert in the margin of the plea, the words "by statute," together with the year of the reign, and the chapter and section of the Act, otherwise the plea shall be taken not to have been pleaded by virtue of any Act of Parliament. See 7 Jac. I., c. 5; 21 Jac. I., c. 4, s. 4; 21 Jac. I., c. 12, s. 5; 11 Geo. II., c. 19, s. 21; 42 Geo. III., c. 85, s. 6; 5 & 6 Will. IV., c. 50, s. 109; 6 & 7 Vict., c. 97, s. 3; 11 & 12 Vict., c. 44, s. 17; 11 & 12 Vict., c. 63, s. 139; 13 & 14 Vict., c. 61, s. 19; 16 & 17 Vict., c. 107, ss. 313 & 317; 24 & 25 Vict., c. 96, s. 113; 25 & 26 Vict., c. 102, s. 106; 28 and 29 Vict., c. 126, s. 49; 30 & 31 Vict., c. 125, ss. 57, 58; 31 Vict., c. 14, s. 89; 31 Vict., c. 15, s. 90.

"He shall not plead any other defence without the leave of the Court or a Judge." In the case of *Hazelfoot v. The Chelmsford Local Board*,‡ which was an action for taking gravel, Sir George Jessel, M.R., gave leave to the defendants to plead the defence of sale by and payment to the authorized agent of the plaintiffs, in addition to the plea of "Not guilty by statute."

Rule 17.

Every allegation of fact in any pleading in an action, not being a petition or summons, if not decided specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition.

See the notes to Rules 20, 21, & 22 of this Order, *infra*.

The principle contained in this Rule is well recognised at the Common

* *Von Joel v. Smith*, *Times*, November 22nd, 1875; 1 Charley's Cases (Court), 95.

† *Ross v. Clifton*, 11 A. and E., 631.

‡ 11 N. C., 180.

**Order XIX.,
Rule 17.**

Law. "A plea in denial," observe the authors of *Precedents of Pleading*,* "admits the truth of all the allegations in the declaration which are not denied by it, provided they are material and might be denied, for it is an essential principle of pleading that whatever is not denied is admitted, and each plea is to be considered by itself, as if it were the only one on the record.†

In the Court of Chancery, also, "the Bill, so far as it was not contradicted by the plea was," Lord Redesdale observes,‡ taken for true."

"All you have to find, under this rule," said Sir George Jessel, M.R., in *Thorp v. Holdsworth*,§ "is no specific denial or no definite refusal to admit."

A motion by infant *cestuis que trustent* that the defendant, their trustee, might be ordered to pay into Court a sum of money, which had been lost through his breach of trust, was granted by Sir Richard Malins, V.C., the defendant, although he had not definitely refused to admit the title of the plaintiffs, not having specifically denied it.||

This Rule must be carefully considered by the pleader in connection with Order XL., Rule 11, *infra*, by which any party to an action is enabled to apply at any stage to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, be entitled to, without waiting for the determination of any other question between the parties. Any such application may be made by motion, as soon as the right of the party applying to the relief claimed has appeared from the pleadings. A statement of defence in an action brought against a husband and wife on their joint and several promissory note, purported to be the defence of the husband as well as that of the wife, but it raised no defence at all as regarded the husband. Vice-Chancellor Hall allowed the plaintiff on affidavit of service of notice of motion, under Order XL., Rule 11, to sign final judgment under Order XXIX., Rule 2, against the husband, upon his admissions, without waiting for the determination of the action as against the wife.¶

The need of circumspection in pleading, as regards the present Rule, is the greater, as the Rule will be enforced strictly. Per Jessel, M.R., in *Thorp v. Holdsworth*.**

In *Lord Hammer v. Flight*,†† Brett, J., said:—"Allegations of fact are made in this statement of claim, and some are denied, and some are not. Those that are not denied are taken as being admitted."†† The dictum remains true, although the diction in the particular case was reversed.‡‡

Where no facts are specifically stated in support of a contention, a plaintiff who joins issue generally, cannot, of course, be taken to have admitted the facts on which the counterclaim is impliedly based.§§

* Bullen and Leake's *Precedents of Pleading*, p. 436, 3rd edn.

† See *Jones v. Brown*, 1 Bing., N.C., 484; *Noel v. Boyd*, 4 Dowl., 415; *Saunderson v. Collman*, 4 M. & G., 209, 225.

‡ Mitford on *Pleading*, 352.

§ 3 Ch. D., 637, 640; 45 L. J. (Ch.), 406.

|| *Symonds v. Jenkins*, 34 L. T., 277; 24 W. R., 512. "He did not know, and could not set forth as to his belief, or otherwise."

¶ *Jenkins v. Davies*, 1 Ch. D., 696; 24 W. R., 690. See, further, the cases cited under Order XL., Rule 11.

** 3 Ch. D., 637; 45 L. J. (Ch.), 406.

†† 24 W. R., 346; 35 L. T., 127.

‡‡ 36 L. T., 279.

§§ *Hillman v. Mayhew*, 24 W. R., 485.

"Except as against an infant, lunatic or person of unsound mind not so found." Great indulgence was always shewn by the Court of Chancery to these persons, who were regarded as peculiarly under its care.*

Order XIX.,
Rule 17.

Rule 18.

Each party in any pleading, not being a petition or summons, must allege all such facts not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, as, for instance, fraud, or that any claim has been barred by the Statute of Limitations, or has been released.

The Statutes of Limitations must, under the old Common Law practice, have been specially pleaded, and by Reg. Gen., Trin. T., 1853, fraud must have been specially pleaded.

"Ground of reply." The plaintiff may reply specially. *Hall v. Eve.*†

"The Statute of Limitations." The defence of the Statute of Limitations cannot be raised on demurrer, under Order XXVIII., Rule 1, but must be specially pleaded pursuant to the present Rule. It is not a conclusive defence against the plaintiff, who might, in his reply, allege facts which would avoid it, and could not be compelled to anticipate in his statement of claim that such a defence would be set up. By means of a demurrer the issue whether the statute applies or not is not raised. *Wakelee v. Davis.*‡ The defence of the Statute of Frauds cannot be raised by demurrer.§ See Rule 23 of this Order, *infra*.

Rule 19.

No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim, or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

This Rule preserves the well-known principle, that there must be no "*departure*" in pleading.

Lord Coke|| defines it thus:—"A departure in pleading is said to be when the second plea containeth matter not pursuant to his former, and which fortified not the same, and therefore it is called *decessus*, because he departeth from his former plea."

* Mitford on Pleading, 252, 390.

† 4 Ch. D., 341; 46 L. J. (Ch.), 145; 25 W. R., 177; 35 L. T., 735, 926.

‡ 25 W. R., 60; 11 N. C., 189.

§ *Catling v. King*, 46 L. J. (Ch.), 384; 36 L. T., 526.

|| Co. Litt., 304a.

Order XXX.,
Rule 19.

"A departure," Mr. Serjeant Stephen points out, * "obviously can never take place till the replication."

A plaintiff may reply specially,† alleging new facts in his reply; but not, of course, so as to involve a violation of this Rule.

Rule 20.

It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim, or for a plaintiff in his reply to deny generally the facts alleged in a defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth.

This Rule should be read with Rule 17 of this Order, *supra*.

"Whereas," observe the authors of *Precedents of Pleading*, "any defence is admissible under the general issue, it is still clearly the interest of the defendant to plead it in that form. By this means he may avoid disclosing his particular ground of defence; he will gain the advantage of throwing the greatest burthen of proof on his adversary, and he may avail himself, not only on the particular defence he proposes to rely on, but also of any other ground which may arise at the trial, and which falls within the scope of the general issue."

The present Rule will be strictly enforced. Per Jessel, M.R., in *Thorp v. Holdsworth*.‡

"It will not be sufficient for a plaintiff in his reply to deny generally the facts alleged in a defence by way of counterclaim." This refers only to the facts alleged in a defence by way of counterclaim. But the plaintiff may reply specially, although there is no counterclaim.§

In *Rolfe v. Maclaren*, the plaintiff|| did not deliver any specific reply to the defendant's counterclaim, pursuant to this Rule, but joined issue generally, under Rule 21. Vice-Chancellor Hall, nevertheless, refused to order the reply to be amended or to strike it out under Order XXVII., Rule 1, as embarrassing.¶

It was contended in this case by the Counsel for the defendant, and conceded by the Counsel for the plaintiff, that the effect of the plaintiff joining issue generally, in violation of the Rule, was to let in Rule 17 of this Order, *supra*, and amount to an admission, namely, of the facts

* Stephen's Pl., 7th edn., 359. See instances of departure, *Hickman v. Walker*, Willes, 27; *Roberts v. Mariett*, 2 Saund., 188.

† *Hall v. Eve*, 4 Ch. D., 341; 46 L. J. (Ch.), 145; 25 W. R., 177; 35 L. T., 735, 926.

‡ 3 Ch. D., 637; 45 L. J. (Ch.), 406.

§ *Hill v. Eve*, 4 Ch. D., 341; 46 L. J. (Ch.), 145; 25 W. R., 177; 35 L. T., 735, 926.

|| "Defendant" is evidently an error in the report of the case in 3 Ch. D.

¶ *Rolfe v. Maclaren*, 3 Ch. D., 106; 24 W. R., 816.

alleged by the defendant in his counterclaim. Where the defendant pleads no facts in support of his counterclaim, Rule 21, and not this Rule, applies, and the plaintiff is at liberty to join issue generally on the defence and counterclaim of the defendant.*

Order XIX.,
Rule 20.

Rule 21.

Subject to the last preceding Rule, the plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequently to reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted.

See the last preceding Rule and the note thereto, *supra*.

The first part of the present Rule is taken from s. 79 of the Common Law Procedure Act, 1852. "Either party may plead in answer to the plea or subsequent pleadings of his adversary, that he joins issue thereon."

The 79th section of that Act proceeds as follows:—"Such forms of joinder of issue shall be deemed to be a denial of the substance of the plea or other subsequent pleadings, and an issue thereon."

Dr. Stephen† points out that "in the rules of pleading given by the Schedule annexed to the Judicature Act, 1873, no pleadings beyond the reply are mentioned," and that "under the system prior to that Act, there was recognised a *rejoinder* on the part of the defendant to the replication a *surrejoinder* from the plaintiff, a *rebutter* by the defendant, and a *sur-rebutter* on the part of the plaintiff."

The present Rule, however, restores the old practice, for it speaks of "*pleading subsequent to reply*."

By Order XXIV., Rule 2, *infra*, no pleading subsequent to the reply can be pleaded without leave of the Court or a Judge.

See the case of *Hall v. Eve*,‡ where a *rejoinder* was necessitated by leave being given to the plaintiff to reply specially.

In the case of *Norris v. Beazley*,§ where the plaintiff had replied specially, the Common Pleas Division refused leave to the defendant to rejoin specially, on the ground that the rejoinder contained matter which ought to be set out, by way of amendment, in the statement of defence.

"Subject to the last preceding Rule," i.e., to the defendant's dealing specifically with the allegations of fact in the plaintiff's statement of claim, and to the plaintiff's dealing specifically with the allegations of fact in the defendant's counterclaim. "The last preceding Rule," does

* *Hillman v. Mayhew*, 24 W. R., 485. See Rule 10 of this Order, *supra*, and Rule 21, *infra*, and *Croue v. Barnicot*, 25 W. R., 789.

† P. 461, n. (a)

‡ 4 Ch. D., 341; 46 L.J. (Ch.), 145; 25 W. R., 177; 35 L.T., 735, 926.

§ 35 L. T., 845.

**Order XIX.,
Rule 21.**

not, however, apply where the defendant sets out no facts in support of his counterclaim. *Hillman v. Mayhew*.*

The defendant cannot *insist* on the plaintiff replying specially to a counterclaim if the plaintiff prefers to join issue generally, and, by so doing, admit the facts set out in support of the counterclaim. "I cannot," said Vice-Chancellor Hall, in delivering judgment to this effect,† "allow a defendant to amend a plaintiff's pleadings, or rather to compel a plaintiff to amend his own pleadings in any way the defendant thinks proper."

In Appendix (C), a form (No. 6) is given of joinder of issue generally on the defendant's statement of defence, followed by a reply, specially, to one of the paragraphs of the statement of defence.

In *Earp v. Henderson*,‡ Vice-Chancellor Bacon's attention was called to this form. He held, however, that a plaintiff cannot join issue generally on the defendant's statement of defence, and then reply, specially, *by way of confession and avoidance*.

In *Hall v. Ere*,§ the following mode of joining issue, and, at the same time, of replying specially, was adopted. The plaintiff admitted some of the paragraphs of the statement of defence, and denied others, he then replied specially; and *lastly*, he *joined issue* with the defendants upon their statement of defence, *except* as to such of the allegations and statements as were thereinbefore admitted. Vice-Chancellor Bacon, no doubt, objected even to this form of pleading. The Court of Appeal upheld it, however, unanimously, on appeal. In *Earp v. Henderson*, moreover, Sir George Bramwell, L.J., put the very point raised in *Earp v. Henderson*, and decided it in an opposite way to Vice-Chancellor Bacon. "In the Appendix several instances of confession and avoidance in special replies are given, and I think, therefore, *the plaintiff may traverse the|| allegations made in the defence, or confess and avoid them, OR BOTH.*"

Rule 22.

When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And so when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny

* 24 W. R., 485.

† *Rolfe v. Maclaren*, 3 Ch. D., 106; 24 W. R., 816.

‡ 3 Ch. D., 254; 34 L. T., 844.

§ 4 Ch. D., 341; 46 L. J. (Ch.), 145; 25 W. R., 177; 35 L. T., 735, 926.

|| Observe: not "some of the," but "the."

it as alleged along with those circumstances, but a fair and substantial answer must be given.

Order XIX.,
Rule 22.

This Rule will be strictly enforced. Per Jessel, M.R., in *Thorp v. Holdsworth*.*

The Rule is taken from Order XV., Rule 2, of the Consolidated Orders of the Court of Chancery. The first clause of the Rule stands thus in the Chancery Order:—"When a defendant denies a fact (*sic*) he must traverse or deny directly, and not by way of *negative pregnant*." The illustration which follows is copied *verbatim* in the above Rule. The last clause of the Rule is thus expressed in the Chancery Order:—"And so where a fact is alleged, with divers circumstances, the defendant must not deny or *traverse* it *literally*, as it is alleged in the Bill, but must answer the point of substance positively and certainly."†

"He must not do so evasively." In *Thorp v. Holdsworth*,‡ the plaintiffs, by their statement of claim, alleged that they and the defendant had agreed to take a lease of certain premises and to enter into partnership; that draft articles of partnership were considered and approved by the plaintiffs and defendant at an interview on a day named, subject to their being finally revised by the defendant's solicitor; and the draft articles had not yet been revised, nor the articles executed; that, although the draft articles were only settled subject to revision, *the terms of the arrangement between the plaintiffs and the defendant as therein provided were definitely agreed upon* at the said interview; that the defendant had not intimated any objection to the terms of the articles; that it was soon after agreed that certain sums should be brought in by the plaintiffs and defendant; that they proceeded with the partnership undertaking, and the defendant had taken an active part in it, but that he had not contributed his share; and that notice had been given him to withdraw from the undertaking. The plaintiffs claimed that it might be declared that they and the defendant were copartners upon the terms provided by the draft articles, and that the partnership might be dissolved. The defendant, in his statement of defence, admitted that he had agreed with the plaintiffs to enter into partnership and take a lease as alleged by the plaintiffs; but he added, "The defendant denies that the terms of the arrangement between himself and the plaintiffs were *definitely agreed upon as alleged*." Sir George Jessel, M.R., in decreeing a dissolution of the partnership upon motion for judgment, under Order XL., Rule 11, on the admissions of fact in the pleadings, observed that the defendant's pleading, denying that "the terms of the arrangement were *definitely agreed upon as alleged*," was evasive within the meaning of the present Rule. "As alleged," said his lordship, "may mean § the whole allegation in the statement of claim, not the allegations of the particular paragraph, I cannot tell from his pleading what part of the plaintiffs' allegations the defendant intends to deny. He may intend to deny that the terms were definitely agreed upon at the

* 3 Ch. D., 637; 45 L. J. (Ch.), 406.

† This Order is as old as 1661.

‡ *Ubi supra*.

§ The reports of the case say "means," but this is evidently an error, for the M.R. immediately proceeds to say that he could not make out what the pleadings meant. If he *could*, the pleading was not "evasive."

Order XIX., Rule 22. interview, although they were definitely agreed upon on some other day, or he may have some peculiar view as to the meaning of the word 'definitely.' He may not be able to say that the terms were not arranged as agreed upon, but he may take the word 'definitely,' because he thinks it may give him some mode of escape. I cannot make out what he means. He is bound to deny that *any* terms of arrangement were ever come to, if that is what he means; if he does not mean that, he should deny that any terms of arrangement were ever come to *except* the following, and then *state what the terms were*; otherwise there is no specific denial."

Where a defendant traverses generally an alleged agreement and supports his denial by a specific allegation of one particular fact, the only issue open to the defendant at the trial is the issue of fact so specifically raised. Per Fry, J., in *Byrd v. Nunn*.*

Rule 23.

When a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise.

The general issues, "*non assumpsit*," and "*non est factum*" operated only as a "denial of the making of the contract in fact,"† and matters in confession and avoidance, and which showed the transaction to be void or voidable in point of law had to be specially pleaded, *e.g.*, release, infancy, coverture. But it was not necessary at Common Law specially to plead the Statute of Frauds, as, if the alleged contract did not satisfy the requirements of that statute, there was no contract at all in fact. Practically, therefore, a defence in matter of law (though not by way of confession or avoidance) was admissible under the general issue. The practice in Equity was different. "If the defendant in Equity intended to rely on the Statute of Frauds, or any other special statute, he was compelled to make a special averment of his intention." Per Mellish, L.J., in *Clarke v. Callow*.‡

Order XIX., Rule 23, is intended partly as an enunciation of the jealousy with which this class of defences is regarded, and partly to assimilate the practice at Common Law and in Equity. Per Brett, L.J., S.C.

The pleadings in the case of *Clarke v. Callow* were as follows:—The statement of claim alleged a contract for the sale of sixty-four-quarters of barley by the plaintiff to the defendant for the sum of £124. 16s. 0d., and also (paragraph 3) that the defendant had "accepted and actually received" the barley. The statement of defence traversed the contract and also *traversed the acceptance and receipt* of the barley. The Judge at the trial (Field, J.) ruled that no question arose under the Statute of

* 25 W. R., 749.

† Reg. Gen., Trin. T., 1853, Rule 6.

‡ 46 L. J. (Q. B.), 53; W. N., 1876, p. 262.

Frauds, as it had not been specially pleaded* pursuant to the present Rule, and the verdict was entered for the plaintiff, although the jury found that the defendant had not received the barley. The Queen's Bench Division refused to grant a rule *nisi* to set aside the verdict, and entered a verdict for the defendant; and the Court of Appeal affirmed this decision. Mr. Merewether, who appeared for the defendant, ingeniously argued before the Court of Appeal that the plaintiff in his third paragraph had introduced the question of the Statute of Frauds by alleging that the defendant had "accepted and actually received" the barley; and as the defendant had traversed the acceptance and receipt, the statements of claim and of defence sufficiently raised the issue under the statute upon the pleadings. Kelly, C.B., however, pointed out that this was merely the allegation and traverse of an immaterial fact. The statute must be *expressly* pleaded, otherwise advantage cannot now be taken of it.

Order XIX.,
Rule 23.

Rule 24.

Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

Compare with this Rule s. 56 of the Common Law Procedure Act, 1852, and see Rule 2 of this Order, and the note thereto, *supra*.

As "Equity pleadings commonly take the form of a prolix narrative, with copies and extracts of deeds, correspondence and other *documents set forth at needless length*,"† the Equity draughtsman will be well advised to give heed to this Rule. The Court of Chancery itself,‡ indeed, has impressed upon its Counsel that they must "take care that the deeds, writings, and records be not unnecessarily set out thereon *in hæc verba*, but that so much of them only as is pertinent and material be given, as Counsel may deem admissible, without needless prolixity."

The Court or Judge, or the Taxing Master by direction of the Court or Judge or *proprio motu*, may *disallow* the costs of any pleading which is "of unnecessary length." Rules of the Supreme Court (Costs).§

See *Marsh v. The Mayor, Aldermen, &c., of Pontefract*,|| as to the power of the Master to strike out whole paragraphs of the pleadings for prolixity.

Rule 25.

Wherever it is material to allege malice, fraudulent

* The defence of the Statute of Frauds cannot be raised by demurrer. *Catling v. King*, 46 L. J. (Ch.), 384; 36 L. T., 526.

† First Report of the Judicature Commission, p. 11.

‡ Order VIII., Rule 2, of the Consolidated Orders of the Court of Chancery.

§ Section 18 of the "General Provisions."

|| 1 Charley's Cases (Chambers), 66.

Order XIX., intention, knowledge, or other condition of the mind of
Rule 25. any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

It will be sufficient, *e.g.*, to allege in an action for malicious prosecution that "the defendant prosecuted legal proceedings against the plaintiff maliciously and without reasonable and probable cause," "without setting out the circumstances from which" this "is to be inferred." *Aderis v. Thrigley*,* per Archibald, J.

Rule 26.

Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice be material.

Some such form as, "of all which the said defendant had notice," will, it is apprehended, be a sufficient allegation of notice under this Rule.

Rule 27.

Whenever any contract or any relation between any persons does not arise from an express agreement, but is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

It is apprehended that the common *indebitatus* counts can no longer be used under this Act, although some of the indorsements of claim given in Appendix (A), Part II., Section II., savour strongly of them. The express statement of the material facts can hardly be satisfied by stating that "the plaintiff sues for money payable by the defendant to the plaintiff for money lent." All counts must, like all pleas, be "special." Under these circumstances it will be seen what a valuable check the present Rule will afford upon prolixity.

* 2 Charley's Cases (Chambers), 43.

In an action for an alleged breach of an agreement to take an assignment of a lease of a house, the plaintiff set out letters between the parties and alleged that they contained the agreement; and Lindley, J., at chambers, notwithstanding the present Rule (which does not, however, appear to have been cited), refused to strike out the statement of claim under Order XXVII., Rule 1, as embarrassing, and as not setting out the facts on which the plaintiff relied.*

Order XIX.,
Rule 27.

Rule 28.

Neither party need in any pleading allege in any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied.

[*E.g.* Consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.]

This Rule embodies two rules of pleading which are placed by Mr. Serjeant Stephen† under the category of restrictive Rules:—"It is not necessary to state matter of law." "It is not necessary to state matter which would come more properly from the other side." "*Ex facto jus oritur* ; and the Judges can gather it for themselves. It is also unnecessary to leap till you come to the stile.‡ It is sufficient that each pleading should in itself contain a good *prima facie* case, without reference to possible objections not yet raised.

Rule 29.

Where an action proceeds in a District Registry all pleadings and other documents required to be filed shall be filed in the District Registry.

See Order XXXV., *infra*, as to District Registries and the entry of proceedings therein. See also s. 64 of the Principal Act, p. 127.

Other Rules relating to District Registries are Order IV.; Order V., Rules 2 and 3; and Order XII., Rules 2, 3, 4, and 5, *supra*.

There is only one case, it is believed, in which "pleadings" are "required by these Rules to be filed," namely, under Rule 6 of this Order, *supra*, where "no appearance has been entered for any party." The pleading is in that case to "be delivered by being filed with the proper officer."

It does not appear to be necessary, in an action commenced in a District Registry, for a dissolution of partnership, in which no appearance has been entered, that any order should be made by the Chancery

* *Hope v. Banks*, 2 Charley's Cases (Chambers), 40.

† Stephen on Pleading, pp. 287, 290.

‡ Per Holt, C.J., in *Sir R. Bovey's case*, 1 Vent., 217. Bramwell, L.J., referred to this old rule of pleading in *Hall v. Eve* (4 Ch. D., 341, 346), with apparent approbation.

er XIX,
ale 29.

Division for the papers to be sent up to London for the hearing. application to the District Registrar, the action will be set down at the District Registry for hearing in London, and, upon that, the papers be sent up to London for the hearing without further order.*

Rule 30.

In actions for damage by collision between vessels, unless the Court or a Judge shall otherwise order, the solicitor shall, before any pleading is delivered, file with the proper officer a document to be called a "Preliminary Act," which shall be sealed up and shall not be opened without the order of the Court or a Judge, and which shall contain a statement of the following particulars:—

(a.) The names of the vessels which came into collision, and the names of their masters.

(b.) The time of the collision.

(c.) The place of the collision.

(d.) The direction of the wind.

(e.) The state of the weather.

(f.) The state and force of the tide.

(g.) The course and speed of the vessel when first seen.

(h.) The lights, if any, carried by her.

(i.) The distance and bearing of the other vessel when first seen.

(k.) The lights, if any, of the other vessel, when first seen.

(l.) Whether any lights of the other vessel, other than those first seen, came into view before the collision.

(m.) What measures were taken, and when, to avoid the collision.

(n.) The parts of each vessel which first came into contact.

If both solicitors consent, the Court or a Judge

* Per Hall, V.C., in *Lumb v. Whiteley*, W.N., 1877, p. 40. See XIII., Rule 9, *supra*.

order the Preliminary Acts to be opened and the evidence to be taken thereon, without its being necessary to deliver any pleadings. Order XIX.,
Rule 30.

This Rule is copied *verbatim* from Rules 62, 63 and 64 of the Rules and Orders of the High Court of Admiralty of November, 1859.

The object of the practice in that Court of requiring Preliminary Acts was to obtain a statement *recenti facto* of the leading circumstances and to prevent either party varying his version of facts, so as to meet the allegations of his opponents.* The Court will never allow a party to contradict his own Preliminary Act at the hearing, and an application to amend a mistake in a Preliminary Act must be made immediately on discovery.†

In cases where an order is made that the cause shall be heard on the Preliminary Acts without any pleadings, it is usual to have the cause heard forthwith on *vivâ voce* evidence in open Court.

In the Vice-Admiralty Courts, the questions mentioned in (f), (h), (k) and (l) have hitherto been omitted from the Preliminary Acts in actions in those Courts for damage by collision between vessels. The Judicial Committee of the Privy Council have recently recommended‡ that these questions should, in future, be dealt with in Preliminary Acts in the Vice-Admiralty Courts.

In the case of *The "John Boyne,"*§ Sir Robert Phillimore, sitting as Judge of the Admiralty Division, decided that the present Rule has no application to an action by the owners of a cargo against the ship that carried it, for damage to the cargo through a collision, owing to the negligence of that ship, between that ship and another ship. The ground of this decision was that there would be no mutuality. The defendant might file a Preliminary Act, but the plaintiffs could not properly file one, having no personal knowledge of the circumstances.

ORDER XX.

PLEADING MATTERS ARISING PENDING THE ACTION.

Rule 1.

Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be pleaded by the defendant in his statement of defence, either alone or together with other grounds of defence. And if, after a statement of defence has been delivered, any ground of defence arises to any set off or counterclaim alleged therein by the defendant, it may be pleaded by the plaintiff in his reply, either alone or together with any other ground of reply.

* *The "Vortigern,"* Swa., 518; *The "Inflexible,"* Swa., 33.

† *The "Vortigern,"* *ubi supra*.

‡ In the case of *The "Norma,"* 35 L. T., 418.

§ 36 L. T., 29; 25 W. R., 756.

**Order XX,
Rule 2.**

The first part of this Rule is founded on sections 68 and 69 of the Common Law Procedure Act, 1852, and the 22nd and 23rd Rules of the Reg. Gen., Trin. T., 1853.

A plea *puis darrein continuance* is, strictly speaking, a plea of a new matter of defence, *e.g.*, a release from the plaintiff, arising *after* plea, but it is used in s. 68 of the Common Law Procedure Act to denote a plea of new matter of defence arising after the commencement of the action, whether *before* or *after* plea. In the present Order two kinds of pleas *puis darrein continuance* are distinguished: the first part of the present Rule deals with pleas *puis darrein continuance* before plea; the next Rule with pleas *puis darrein continuance* arising after plea; the third Rule deals with both.

By Rule 22 of the Reg. Gen., Trin. T., 1853, "a plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defences arising before the commencement of the action."

No form of plea *puis darrein continuance* is given in the Appendix; but it may be assumed that it will be stated, as heretofore, that the new matter arose "after the last pleading in this action." Of course this can only be done where, as under the present Rule, the new matter of defence arises *before* plea or statement of defence.

Further particulars as to this plea will be found in Archbold's Practice, Part II., Chapter 2.

The second clause of this Rule introduces a new practice, founded on Order XIX., Rule 3, *supra*, and subsection (3) of s. 24 of the Principal Act, *supra*.

There is no mention in the first paragraph of this Rule of a counterclaim, and Jessel, M.R., in *The Original Hartlepool Collieries Company v. Gibb*,* said that a counterclaim must not, *except by leave*, relate to matters subsequent to the date of issuing the writ.

Rule 2.

Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may, and where any ground of defence to any set-off or counterclaim arises after reply, or after the time limited for delivering a reply has expired, the plaintiff may, within eight days after such ground of defence has arisen, and by leave of the Court or a Judge, deliver a further defence or further reply, as the case may be, setting forth the same.

By section 69 of the Common Law Procedure Act, 1852, "no such plea shall be pleaded unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, and unless a Court or a Judge shall otherwise order." There is no similar requirement, it will be perceived, of an affidavit in this Order.

* 46 L. J. (Ch.), 311.

By pleading this plea the defendant abandons all his former pleas.* : Order XX.,
It may be pleaded at any time before verdict, even after the jury have Rule 2.
retired to consider their verdict.† If pleaded after a demurrer, it operates as a *retraxit* of the demurrer.‡

Rule 3.

Whenever any defendant, in his statement of defence, or in any further statement of defence as in the last Rule mentioned, alleges any ground of defence which has arisen after the commencement of the action,§ the plaintiff may deliver a confession of such defence, which confession may be in the Form No. 2 in Appendix (B) hereto, with such variations as circumstances may require, and he may thereupon sign judgment for his costs up to the time of the pleading of such defence, unless the Court or a Judge shall, either before or after the delivery of such confession, otherwise order.

The Form No. 2 in Appendix (B), *infra*, is new.

This Rule is taken from Rules 22 and 23 of the Reg. Gen., Trin. T., 1853. The words, "unless the Court or a Judge shall otherwise order," are, however, new.

Where a plea that the plaintiff, since the last pleading, had been convicted of felony, is pleaded *puis darrein continuance*, the plaintiff may confess the plea, and sign judgment for his costs under this Rule.||

Where a plea that the plaintiff, since the commencement of the action, has become bankrupt, is pleaded on the day of trial, it is in the nature of a plea *puis darrein continuance*, and if the plaintiff confesses the plea, he may, under Rules 22 and 23 of Trinity Term, 1853, if the case falls under the old procedure, or (*semble*) under the present Rule, if the case falls under the new procedure, sign judgment for his costs up to the time of the pleading of such defence.¶

A counterclaim founded on facts which have arisen since the action was brought, should be pleaded *puis darrein continuance*, so that the plaintiff may have an opportunity of confessing the plea under this Rule and of signing judgment for his costs up to the time of the defence being so pleaded. If it be not so pleaded, the plaintiff should take out a summons to strike out the counterclaim, unless it be so amended as to make it appear that the facts which supported it arose after action brought.**

* *Barber v. Palmer*, 1 Salk., 178. † *Pearson v. Parkins*, B. N. P., 310.

‡ *Stoner v. Gibbons*, Moore, 871.

§ See, as to this, *Callender v. Hawkins*, 12 N. C., 143.

|| *Barnett v. L. & N. W. Ry. Co.*, 5 H. & N., 604. See, also, as to the Rule, *Newington v. Levy*, 5 L. R. (C.P.), 607; 6 L. R. (C.P.), 10.

¶ *Foster v. Gamgee*, 1 Q. B. D., 666; 45 L. J. (Q. B.), 576; 34 L. T., 248; 24 W. R., 319.

** *Ellis v. Munson*, 35 L. T., 585.

Order XXI,
Rule 1.

ORDER XXI.

STATEMENT OF CLAIM.

Rule 1.

Subject to Rules 2 and 3 of this Order, the delivery of statements of claim shall be regulated as follows:—

(a.) If the defendant shall not state that he does not require the delivery of a statement of claim the plaintiff shall, unless otherwise ordered by the Court or a Judge, deliver it within six weeks from the time of the defendant's entering his appearance.

(b.) The plaintiff may, if he think fit, at any time after the issue of the writ of summons, deliver a statement of claim with the writ of summons or notice in lieu of writ of summons, or at any time afterwards, either before or after appearance, and although the defendant may have appeared and stated that he does not require the delivery of a statement of claim. Provided that in no case where a defendant has appeared shall a statement be delivered more than six weeks after the appearance has been entered, unless otherwise ordered by the Court or a Judge.

(c.) Where a plaintiff delivers a statement of claim without being required to do so, the Court or a Judge may make such order as to the costs occasioned thereby as shall seem just, if it appears that the delivery of a statement of claim was unnecessary or improper.

"Subject to Rules 2 and 3 of this Order." Rule 2 relates to Probate actions, Rule 3 to Admiralty actions *in rem*.

"If the defendant shall not state that he does not require the delivery of a statement of claim." See the form of the Memorandum of Appearance, App. (A), Part I., No. 6, *infra*, in which a space is left for the defendant to state whether he does or *does not* require a statement of complaint (claim) to be delivered.

Where an action is to be heard as a "short cause," the defendant should,

in his memorandum of appearance, to save expense, not require the plaintiff to deliver a statement of claim.* So held by Sir George Jessel, M.R., and Sir Charles Hall, V.C. Vice-Chancellor Malins, on the other hand, has insisted on a statement of claim being delivered in short causes, even although (1) the defendant has stated in his memorandum of appearance that he did not require any, and (2) Counsel on both sides have argued against his lordship.†

Order XXII.,
Rule 1.

"Unless otherwise ordered by the Court or a Judge." By Order LVII., Rule 6, a Court or a Judge has power to enlarge the time. The application is by summons‡ to shew cause why the time should not be enlarged to a given extent. By Order XXIX., Rule 1, on the other hand, "if the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of the time, apply to the Court or a Judge to dismiss the action with costs for the want of prosecution." The application should be by summons by the defendant to the plaintiff to shew cause why the action should not be dismissed for want of prosecution. Such an application was made in the case of *Higginbotham v. Aynsley*.§ Vice-Chancellor Hall allowed the plaintiff one week's grace, making, in all, seven weeks, for the delivery of his statement of claim.

"Deliver it within six weeks from the time of the defendant's entering his appearance." Subsection (a) of this Rule effects a considerable change in the practice at Common Law with respect to declaring. The plaintiff has hitherto had the whole of the term next after the appearance was entered to declare in, and this whether the appearance was entered in term time or in vacation. After the expiration of that interval the defendant was entitled to give him notice to declare within four days.|| If the plaintiff was not ready to declare within the four days, he could apply to a Judge for further time to declare, which would be granted, if sufficient grounds were stated. At the expiration of the four days the defendant was entitled to sign judgment of *non pros* against him. If the defendant did not give the notice and obtain judgment of *non pros*, the plaintiff might declare at any time within a year next after the service of the writ.¶

By Order XXXVII., Rule 4, of the Consolidated Orders of the Court of Chancery, "a defendant required to answer a bill must put in his plea, answer, or demurrer thereto, within twenty-eight days from the delivery to them or to his solicitor of a copy of the interrogatories which he is required to answer."

The practice at Common Law and in Chancery will now be assimilated, and, unless the Court or a Judge otherwise order, the plaintiff is to deliver his declaration within six weeks from the appearance of the defendant.

Subsection (b) introduces a considerable innovation by enabling a plaintiff to deliver a declaration with the writ of summons or at any time before appearance. The only case in which a plaintiff could previously declare

* *Taylor v. Duckett*, W. N., 1875, p. 193; 1 Charley's Cases (Court), 98; *Green v. Coleby*, 1 Ch. D., 693; 45 L. J. (Ch.), 303; 24 W. R., 246.

† *Breton v. Mockett*, 33 L. T., 684; W. N., 1875, p. 255; *Boyes v. Cook*, 33 L. T., 778; W. N., 1876, p. 28.

‡ *Everett v. Lawrence*, W. N., 1876, p. 278; *Wilkins v. Bedford*, 35 L. T., 622; *Coe's Practice of the Judges' Chambers*, 35.

§ 3 Ch. D., 288; 24 W. R., 782.

|| Common Law Procedure Act, 1852, s. 53.

¶ *Ib.*, s. 58.

520 SUPREME COURT OF JUDICATURE ACT, 1876.

**Order XXI.,
Rule 1.** before appearance was under section 28 of the Common Law Procedure Act, 1852, in the case of the non-appearance of a defendant to a writ not specially indorsed.

Subsection (c). "The costs." If the defendant foregoes a statement of claim the plaintiff may be fined in costs for unnecessarily or improperly delivering to him one. See the Rules of the Supreme Court (Costs), *infra*.

As to particulars, see the notes to Order III., Rule 6, and Order XIX., Rule 4.

Rule 2.

In Probate actions the plaintiff shall, unless otherwise ordered by the Court or a Judge, deliver his statement of claim within six weeks from the entry of appearance by the defendant, or from the time limited for his appearance, in case he has made default; but, where the defendant has appeared, the plaintiff shall not be compelled to deliver it until the expiration of eight days after the defendant has filed his affidavit as to scripts.

This Rule is copied from the 34th Rule of the Rules in contentious business of the Court of Probate, with the substitution of "six weeks" for one month, in order to assimilate the practice to that of the other Divisions.

A form of Affidavit of Scripts is given, App. (B), No. 16, *infra*.

Rule 3.

In Admiralty actions *in rem* the plaintiff shall, within twelve days from the appearance of the defendant, deliver his statement of claim.

This Rule is copied from the 58th Rule of the Rules and Orders of the High Court of Admiralty: "Within 12 days from the entry of an appearance, the plaintiff's proctor shall file his petition."*

Rule 4.

Where the writ is specially indorsed, and the defendant has not dispensed with a statement of claim, it shall be sufficient for the plaintiff to deliver as his statement of claim a notice to the effect that his claim is that which appears by the indorsement upon the writ, unless the Court or a Judge shall order him to deliver a further statement.

* "The petition is in the nature of a declaration at Common Law." Williams and Bruce's Admiralty Practice, p. 246.

Such notice may be either written or printed, or partly written and partly printed, and may be in the Form No. 3 in Appendix (B) hereto, and shall be marked on the face in the same manner as is required in the case of an ordinary statement of claim. And when the plaintiff is ordered to deliver such further statement, it shall be delivered within such time as by such order shall be directed, and if no time be so limited then within the time prescribed by Rule 1 of this Order.

Order XXI.,
Rule 4.

As to writs specially indorsed, see Order III., Rule 7, *supra*. As to the course of proceedings in case of non-appearance by the defendant, see Order XIII., Rule 3, *supra*. As to calling upon the defendant to show cause why the plaintiff shall not be at liberty to sign final judgment, where the defendant has appeared, see Order XIV., *supra*.

After the defendant has surmounted the perils of the XIVth Order, he will be confronted by the present Rule, telling him to look at the special indorsement; if he wants to know the nature of the plaintiff's claim. If the defence is a *bona fide* one, the defendant will be pretty sure to avail himself of the opportunity afforded him by this Rule of applying by motion to the Court, or by summons to a Judge for an Order calling upon the plaintiff to deliver a further statement of claim. If no time is mentioned in the order for the delivery of the further statement, it must be delivered within six weeks from the time of the defendant's entering an appearance.

In an action by a widow, as administratrix of her late husband, an auctioneer, against his solicitor, particulars of the claim were ordered to be delivered, in addition to those specially indorsed on the writ.*

In an action in which it did not clearly appear what was the plaintiff's claim, and the defendant wished to get up a counterclaim, a further statement was ordered to be delivered in addition to that specially indorsed on the writ.†

ORDER XXII.

DEFENCE.

Rule 1.

Where a statement of claim is delivered to a defendant he shall deliver his defence within eight days‡ from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a Judge.

* *Cotton v. Housman*, 2 Charley's Cases (Chambers), 36.

† *Schomberg v. Zoebelli*, *ibid.* See further, as to this Rule, the note to Order XXII., Rule 3, *infra*.

‡ Pleas in abatement were pleaded within four days, but they are abolished by Order XIX., Rule 13, *supra*.

**Order XXII,
Rule 1.**

This Rule is taken from §. 63 of the Common Law Procedure Act, 1852. By Order XXVIII., Rule 3, a demurrer must be delivered "within the same time as any other pleading in the action": *e.g.*, if it is a demurrer to the statement of claim, it must be delivered within eight days from the delivery of the statement of claim (Order XXII., Rule 1), like a statement of defence; if it is a demurrer to the statement of defence, it must be delivered within three weeks from the delivery of the statement of defence (Order XXIV., Rule 1), like a reply. But suppose that, under Order LVII., Rule 6, the time is enlarged *for the delivery of the statement of defence*, will this enlargement of time enable the defendant to demur to the statement of claim after the eight days from the delivery of the statement of claim shall have elapsed? Jessel, M.R., has held that the words "statement of defence" will include a demurrer, so as to give a defendant, who demurs instead of pleading, the benefit of the enlargement of time.* "A demurrer," said his lordship, "is a defence."

As to particulars, see *Smith v. West*, † and *The Colonial Assurance Corporation v. Prosser*. ‡

Rule 2.

A defendant who has appeared in an action and stated that he does not require the delivery of a statement of claim, and to whom a statement of claim is not delivered, may deliver a defence at any time within eight days after his appearance, unless such time is extended by the Court or a Judge.

"*May* deliver a defence." "It seems clear," said Mr. Justice Lindley, at chambers, in the case of *Hooper v. Giles*, "that where the defendant dispenses with a statement of claim, and no statement of claim is delivered, no statement of defence can be required. §

See Order LVII., Rule 6, as to extending the time.

Rule 3.

Where leave has been given to a defendant to defend under Order XIV., Rule 1, he shall deliver his defence, if any, within such time as shall be limited by the order giving him leave to defend, or, if no time is thereby limited, then within eight days after the order.

"Order XIV., Rule 1." See the whole of that Order, which relates to the speedy process provided for the recovery of debts and liquidated demands, where the writ is specially indorsed.

See also Order XXI., Rule 4, *supra*, and the note thereto.

* *Hodges v. Hodges*, 2 Ch. D., 112; 24 W. R., 293.

† 2 Charley's Cases (Chambers), 41. ‡ *Ib.*, 36.

§ *Hooper v. Giles*, 1 Charley's Cases (Chambers), 68.

Lindley, J., at chambers, decided that where the writ has been specially indorsed under Order III., Rule 6, and leave has been given to the defendant to defend under Order XIV., Rule 1, the defendant must deliver a statement of defence within the time limited under the present Rule, otherwise the plaintiff will be entitled to sign final judgment for his debt and costs under Order XXIX., Rule 2, at the expiration of such time, although the defendant has not dispensed with a statement of claim, and the plaintiff has delivered no notice that his claim is such as appears by the writ, pursuant to Order XXI., Rule 4.*

**Order XXII.,
Rule 2.**

Archibald, J., at chambers, decided that, where the Master has indorsed "No Order," on an application by the plaintiff for leave to sign judgment under Order XIV., Rule 1, on a specially indorsed writ, this is equivalent to leave to the defendant to defend under that Rule; and if the defendant does not deliver his statement of defence within eight days after such leave under the present Rule, the plaintiff may then sign final judgment, no statement of claim, or notice that the plaintiff's claim is such as appears by the writ, being necessary, although the defendant has not dispensed with a statement of claim.†

These two decisions appear, no doubt, to conflict with Order XXI., Rule 4, which requires that where the writ is specially indorsed, and the defendant has not dispensed with a statement of claim, the plaintiff may, in lieu of delivering a formal statement of claim, deliver a notice that his claim is such as appears by the indorsement on the writ. On the other hand, the language of the present Rule, "he shall deliver his defence within eight days *after the order*," not after the delivery of the notice in App. (B), Part I., Form No. 3, seems to bear out the *dictum* of Lindley, J., at chambers,‡ that "it cannot be necessary to deliver a statement of claim where the writ is specially indorsed."

The solution of the difficulty appears to be, reading Order XXI., Rule 4, with the present Rule, that the present Rule only applies to the case where a writ is specially indorsed and *the defendant has dispensed with a statement of claim*, and that where the writ is specially indorsed and the defendant has not dispensed with a statement of claim, the provisions of Rule 1 of this Order apply, with this qualification that, instead of the words "delivery of the statement of claim," must be substituted the words "delivery of notice to the effect that the plaintiff's claim is such as appears by the indorsement upon the writ."

It is desirable, however, that this moot point should be cleared up by a new Rule, or new Rules.

Rule 4.

Where the Court or a Judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the Court may make

* *Atkins v. Taylor*, 1 Charley's Cases (Chambers), 53. See also Order XIV., Rule 1a, and the note thereto, *supra*.

† *The Margate Pier and Harbour Company v. Perry*, 2 Charley's Cases (Chambers), 19.

‡ In *Atkins v. Taylor*, 1 Charley's Cases (Chambers), 53, 54.

Order XXII., such order as shall be just with respect to any extra costs
Rule 4. occasioned by their having been denied or not admitted.

"Denied or not admitted." See Order XIX., Rule 17.

Under s. 52 of the Common Law Procedure Act, 1852, a defendant, whose pleading tends to "prejudice, embarrass, or delay the fair trial of the action," may be visited, similarly, with costs.

See, further, as to visiting with costs, the Rules of the Supreme Court (Costs), *infra*.

Rule 5.

Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff along with any other person or persons, he shall add to the title of his defence a further title similar to the title in a statement of complaint, setting forth the names of all the persons who, if such counterclaim were to be enforced by cross action, would be defendants to such cross action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff.

See Order XIX., Rule 3 and 10, and subsection (3) of section 24 of the Principal Act, *supra*, and also App. (C), Precedent No. 14, *infra*.

There cannot, in the opinion of Jessel, M.R.,* be, properly speaking, a *counterclaim* by a defendant against his co-defendant. A counterclaim, in his lordship's opinion, must seek relief against the plaintiff, or against the plaintiff along with some other person or persons.

Where, in an action for the price of iron, the defendant sets up a counterclaim for deductions which he has had to allow to a purchaser, owing to the inferiority in quality of the iron, it is not necessary to add the purchaser's name to the title of the action.†

A good illustration of a counterclaim raising questions between the defendant, on the one hand, and the plaintiff along with another person, on the other, is afforded by the case of *Dear v. Swarder*, *Swarder v. Dear*,‡ which is epitomised under Rule 9 of this Order *infra*.

Rule 6.

When any such person as in the last preceding Rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the

* In *Warner v. Twining*, 24 W. R., 356; see *Furness v. Booth*, 4 Ch. D., 586; 46 L. J. (Ch.), 112; 25 W. R., 267. See, also, *Harris v. Gamble*, W. N., 1877, p. 142; 12 N. C., 133.

† 1 Charley's Cases (Chambers), 85.

‡ 4 Ch. D., 476; 46 L. J. (Ch.), 100; 25 W. R., 124.

defence, and such service shall be regulated by the same Rules as are hereinbefore contained with respect to the service of a writ of summons, and every defence so served shall be indorsed in the Form No. 4 in Appendix (B) hereto, or to the like effect.

Order XXII.,
Rule 6.

"Hereinbefore," *i.e.*, in Order IX., X., and XI., *supra*.

The notice calls upon the third party to appear within eight days from service, as in the case of an ordinary writ of summons.

A somewhat similar process is prescribed by Order XVI., Rule 18, *supra*, for securing the appearance of a third party, when a defendant claims contribution, &c., from him with a view to helping the defendant to meet his obligations to the plaintiff. In the case contemplated by the present Rule the third party is a co-defendant of the plaintiff to a *quasi* cross action by the defendant. In the case contemplated by Order XVI., Rule 17, *supra*, the third party is a co-defendant of the defendant summoned by the defendant.

Form No. 4 of App. (B), *infra*, gives notice to the third party that, if he fail to appear, judgment will be given *against* him. Form No. 1 of App. (B), *infra* (applicable to Order XVI., Rule 18), gives notice to the third party that if he fail to appear, he will be *estopped* by the judgment from denying its validity. It is important not to confuse the two kinds of procedure.*

Rule 7.

Any person not a defendant to the action, who is served with the defence and counterclaim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action.

Compare Order XVI., Rule 20, *supra*.

"Must appear thereto," *i.e.*, within eight days after service. See App. (A), Part I., Forms Nos. 1 and 2, *infra*. See also Order XII., "Appearance," *supra*.

Rule 8.

Any person named in a defence, as a party to a counterclaim thereby made, may deliver a reply within the time within which he might deliver a defence if it were a statement of claim.

Compare Order XVI., Rule 21, *supra*.

"Within the time," *i.e.*, "within eight days" after the delivery of the "defence and counterclaim." See Rule 1 of this Order, *supra*.

"A reply." But he cannot deliver a counterclaim.†

* In *Dear v. Sworder*, *Sworder v. Dear* (*ubi supra*), Hall, V.C., thought that both were included in subs. (3) of s. 24 of the Act of 1873.

† *Street v. Gover*, *Gover v. Street and Potts*, 36 L. T., 766; 25 W. R., 750.

**Order XXII.,
Rule 9.****Rule 9.**

Where a defendant by his statement of defence sets up a counterclaim, if the plaintiff or any other person named in manner aforesaid as party to such counterclaim contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent action, he may at any time before reply, apply to the Court or a Judge for an order that such counterclaim may be excluded, and the Court or a Judge may, on the hearing of such application, make such order as shall be just.

This Rule works out in detail the principle embodied in the second part of Rule 3 of Order XIX., *supra*.

In an action for libel brought by a director of a company, a counterclaim for damages for loss sustained by the defendant in respect of shares in the company bought on false representations made by the directors, was excluded under this Rule by Lindley, J., at chambers, on terms.*

In an action of assault and slander, and counterclaim for breach of a parol agreement to repair, was excluded by Quain, J., at chambers, although the parties were talking about the state of the house at the time that the cause of action arose.* "The matters alleged in the counterclaim," said Mr. Justice Quain, "are not really in any way connected with the plaintiff's cause of action. The assault alleged here is of a very serious kind; † and that when it took place, the parties happened to be talking about the state of this house is not sufficient to connect these two claims."

The leading case on the exclusion of counterclaims under this Rule, on the ground that they are not sufficiently connected with the subject-matter of the action, and are calculated unduly to embarrass and delay the plaintiff, is *Padwick v. Scott*.‡ This was an action brought in the Common Pleas, but transferred to the Chancery Division, in which the plaintiff Padwick, by his statement of claim, sought to recover from the defendant Sir C. E. Scott a sum of £10,000, which the plaintiff alleged that he had been compelled to bring into a settlement, of which he was trustee and the defendant *cestui que trust*, in order to replace a similar sum secured by policies which the plaintiff, by an innocent breach of trust, had permitted to be withdrawn from the settlement upon a joint and several covenant by the defendant and his father to indemnify him. The defendant, Sir C. E. Scott, delivered a defence and counterclaim, to which he made the plaintiff Padwick and one E. H. Scott defendants. In the defence he denied that the plaintiff had sustained any loss, or that any claim had been made upon him, and insisted that the covenant to indemnify the plaintiff had been obtained by duress, and was void; and by way of counterclaim he stated, first, that by the deed of indemnity his father covenanted to indemnify

* *Nicolson v. Jackson*, 2 Charley's Cases (Chambers), 37.

† *Lee v. Collyer*, 1 Charley's Cases (Chambers), 86.

‡ The alleged assault was that the defendant spat in the plaintiff's face.

§ 2 Ch. D., 736; 45 L. J. (Ch.), 350; 24 W. R., 723.

him against his indemnity, and that Padwick and E. H. Scott, being his father's executors, must, under circumstances which he detailed, be taken to have admitted assets sufficient to satisfy the covenant of counter-indemnity, and that the plaintiff Padwick ought to be considered as having retained out of those assets the amount of his claim so as to extinguish it; and if assets had not been admitted by the defendants to the counter-claim, the plaintiff in it claimed a declaration that the counter-indemnity ought to be answered out of his father's estate, and that such estate might be administered for that purpose; and by way of further counterclaim, Sir C. E. Scott stated that his father had, by a certain deed, appointed a sum of £10,000 to the defendant E. H. Scott upon a secret trust, to apply it in satisfaction of the liabilities of both his father and himself under the deed of indemnity: and he claimed performance of the trust accordingly. The plaintiff Padwick moved under the present Rule that these counter-claims might be excluded. Vice-Chancellor Hall ordered both counter-claims to be excluded, the first on the ground that it could only be worked out on admission of assets by the defendants to it, or by administration of the father's estate, and that the original action ought not to be stayed in order that the counterclaim might be so worked out; and the second, on the ground that it was so separate from the original cause of action, that to allow it to be mixed up with that action would be doing the plaintiff therein an injustice. His lordship directed the costs of the plaintiff and the original defendant to be costs in the action, the plaintiff to pay the costs of the defendant to the counterclaim, and to get them from the defendant in the action.

**Order XXII.,
Rule 9.**

It is interesting to contrast the case of *Padwick v. Scott* with that of *Dear v. Swoorder*, *Swoorder v. Dear*,* in which the same learned Judge dismissed, with costs, an application by a third party for the exclusion of a counterclaim, as against him. This was an action by second mortgagees against the first mortgagee, claiming to have an account taken as between them and him, and that he might be directed to complete a contract, which he had entered into with a third party, for the sale of the property under the power of sale contained in his mortgage. The defendant put in a defence and counterclaim, making the third party, the purchaser, a defendant to his counterclaim, jointly with the original plaintiffs, and served it under Rules 5 and 6 of this Order. The defendant stated in his counterclaim that the plaintiffs had agreed to concur in the conveyance to the purchaser, but had subsequently refused to concur, and that the purchaser refused to convey without the concurrence of the plaintiffs. The defendant claimed specific performance as against the purchaser, and also that the plaintiffs might be ordered to concur. Vice-Chancellor Hall, in dismissing the purchaser's application to have the counterclaim excluded, under the present Rule, so far as it sought relief against him, said that the counterclaim exactly fell under Rule 5 of this Order, raising, as it did, a question between the original defendant and the original plaintiffs along with another person, i.e., the purchaser, the question being that the purchaser must convey and the plaintiffs concur in the conveyance before the plaintiffs could recover against the defendant.

Rule 10.

Where in any action a set-off or counterclaim is established as a defence against the plaintiff's claim, the Court

* 4 Ch. D., 476; 46 L. J. (Ch.), 100; 25 W. R., 124.

Order XXII., may, if the balance is in favour of the defendant, (Rule 10. judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

This Rule is a re-enactment of Rule 21 of the Principal Act, *supra*. Compare Order XIX., Rule 2, *supra*.

Where, in an action to recover £28, the defendant pleaded a set-off of £96, an application by the defendant to proceed under the Supreme Court of Judicature Acts, with a view to recovering the balance of the set-off in his favour, was granted by Quain, J., at chambers.*

"The balance," mentioned in this Rule, means the balance found at trial (or hearing) of the action to be due to the defendant, after taking into consideration both the claim of the plaintiff and the counterclaim of the defendant.† An order for an account of the balance alleged by the defendant to be due to him on his counterclaim will not, therefore, be made before the trial (or hearing) of the action.‡

Rule 11.

In Probate actions the party opposing a will may, in his defence, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Court of Probate.

This Rule is copied from Rule 41 of the Rules of the Court of Probate, "defence" being substituted for "plea," and "Court of Probate" for "Prerogative Court."

As to what are "Probate actions," see the Interpretation Clause, Order LXIII., *infra*.

ORDER XXIII.

DISCONTINUANCE.

Rule 1.

The plaintiff may, at any time before the receipt of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action

* 1 Charley's Cases (Chambers), 87.

† The converse holds good, i.e., where the balance is in favour of the plaintiff. *Staples v. Young*, 2 Ex. D., 324.

‡ *Rolfe v. Maclaren*, 3 Ch. D., 106; 24 W. R., 816. *Aitken v. Dunk*, 46 L. J. (Ch.), 489.

(save any interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this Rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a Judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counterclaim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.

Order XXIII.,
Rule 1.

This Rule is a re-enactment of the four first clauses of Rule 46 of the Principal Act. The remainder of the 46th Rule of the Principal Act will be found under Order XLI., Rule 6, *infra*.

If the plaintiff in an action at law found that he had misconceived his action, or that through some defect in the pleadings or otherwise, he would not be able to maintain it, he obtained, before argument on demurrer, or verdict, a side-bar rule, ordering that, upon payment of the defendant's costs, the action be discontinued. Part of an action could not be discontinued, as the discontinuance put an end to the whole of it.* In order to discontinue after judgment on demurrer, or verdict, the leave of the Court or Judge was necessary. Before the Rules of Hil. T., 1853, it was requisite to get the consent of the defendant's attorney to the rule, if it were sought to utilize it after plea pleaded; but by the 23rd Rule of that Term this consent was declared to be no longer necessary, and in lieu of it it was stipulated that the rule must contain an undertaking to pay the costs, and a consent that, if they should not be paid, the defendant might sign judgment of *non pros*. If the rule were not acted on, in the case of a discontinuance before plea, the plaintiff might be compelled to

* *Barton v. Polkinthorne*, 16 M. and W., 8.

Order XXIII., proceed.* If the plaintiff went on and obtained a verdict, the verdict
Rule 1. would not have been set aside, as the rule, not having been acted on, became a nullity.† After a discontinuance, the plaintiff might have commenced a new action for the same cause, a judgment of discontinuance being in the nature of a nonsuit.‡

It may be added that, by consent, the rule to discontinue might have been drawn up without costs.§

In Equity, the proceeding analogous to a discontinuance was a dismissal of his Bill by a plaintiff. Before the appearance of a defendant, the plaintiff might have dismissed the Bill as against him without costs.|| After appearance, and before decree, the plaintiff might generally, on motion of course or a petition of course in the Rolls, have obtained an order to dismiss the Bill on payment of costs; and by consent, even without payment of costs,¶ and, in a proper case, even without the defendant's consent.** Where the plaintiff applied to dismiss the Bill without costs and without the defendant's consent, the application to dismiss was usually made by special motion, of which notice was served on the defendant.††

Under the present Rule proceedings by way of discontinuance apply to the Chancery Division as well as to the Common Law Divisions of the Supreme Court; discontinuance is by notice in writing, instead of by side-bar rule; "any part or parts" of the plaintiff's "alleged cause of complaint" may be discontinued; and the action cannot be discontinued by the plaintiff after he has taken any proceeding subsequent to the receipt of the statement of defence, *e.g.*, after his reply, without leave of the Court or of a Judge. (Under the former practice he might have discontinued at any time before verdict, without leave.)

The last clause of this Rule hardly falls under the title "discontinuance," as it is a recognized principle that a *plaintiff only* can discontinue. The expression "discontinue" is not, however, applied, it will be seen, to the defendant.

Leave to withdraw a plea has hitherto been, in general, granted, on such terms as to costs or otherwise as the Court or a Judge might deem fit. The Court or a Judge would, in like manner, have allowed a plaintiff to withdraw a replication.‡‡

There was, perhaps, some confusion in the mind of the draughtsman of this Rule between a discontinuance and the withdrawal of the record. Where the record is withdrawn, it may, by leave, be re-entered at the same assizes. After a discontinuance the plaintiff is put to a new action for the same cause.§§

"And thereupon he shall pay the defendant's costs of the action." In the case of *Bolton v. Bolton*,||| it was decided by Vice-Chancellor Hall that these words have the effect of an order or judgment of the Court, upon

* *Beeton v. Jupp*, 15 M. and W., 149.

† *Edgington v. Proudman*, 1 D. P. C., 152.

‡ *Mayor of Macclesfield v. Gee*, 13 M. and W., 470.

§ Archbold's Practice, p. 1485.

|| *Thompson v. Thompson*, 7 Beav., 350.

¶ *Dixon v. Parks*, 1 Ves. Jun., 402.

** *Knox v. Brown*, 2 Bro. C. C., 166.

†† 1 Daniel's Chancery Practice, pp. 690, 691.

‡‡ See *Alder v. Chip*, 2 Burr., 755.

§§ As to discontinuance in ejectment, see s. 200 of the Common Law Procedure Act, 1852.

||| 3 Ch. D., 276; 35 L. T., 858; 24 W. R., 663.

which a writ of execution may issue without any further order or judgment. His lordship permitted the form of the writ of *fi. fa.* in App. (F), No. 1, to be varied,* so as to carry out this view of the Rule. Order XXIII.,
Rule 1.

The case of *Bolton v. Bolton* was decided on the 28th of May, 1876; on the 25th of June, 1876, the Supreme Court issued a new set of Rules of Court, the 10th of which now forms Rule 2a of this Order, and empowers the defendant to “*sign judgment*” for costs, if the action be discontinued, thus obviating any further necessity for the rather forced construction of the present Rule in *Bolton v. Bolton*.

The words “shall pay” are imperative. A plaintiff, who discontinued after succeeding on an interlocutory motion, was ordered to pay *all* the costs of the cause. *The “St. Olaf.”*†

“Leave of the Court or a Judge.” Leave is not requisite to withdraw the record in an action commenced before the 1st of November, 1875: Per Denman, J., at Nisi Prius.‡ Leave to withdraw the record was refused by Huddleston, B., at Nisi Prius, although the Counsel for the plaintiff was not sufficiently instructed in the case.§ “The Judicature Acts,” said his lordship, “will be of the greatest benefit to the public, if they prevent plaintiffs from bringing defendants down here, and *then* withdrawing the record.”

The necessity of obtaining leave from the sitting Judge proved, however, so burthensome, that Rule 2 of this Order was made to mitigate its severity.

An order of the Master staying an action, was varied by Lindley, J., at chambers, substituting the word “discontinuing” for “staying,” so as to put an end to the action altogether.||

Rule 2.

When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing, signed by the parties.

This new Rule was added by Rule 9 of the Rules of the Supreme Court, December, 1875, to obviate the necessity of applying in every case to the sitting Judge for leave, under Rule 1 of this Order. See the note to that Rule, *supra*.

Rule 2a.

A defendant may sign judgment for the costs of an action, if it is wholly discontinued, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued.

This new Rule was added by Rule 10 of the Rules of the Supreme Court, June, 1876, to obviate any further necessity for treating the words

* Under Order XLII., Rule 10. See Rule 9 of that Order, as to the necessity of producing the judgment. † 2 P. D., 113; 36 L. T., 30.

‡ *Anon.*, *Times*, November 12th, 1875; 1 Charley's Cases (Court), 99.

§ *Learmonth v. Croll*, *Times*, November 15th, 1875; 1 Charley's Cases (Court), 100.

|| 2 Charley's Cases (Chambers), 38.

Order XXIII., Rule 2a. in Rule 1 of this Order, *supra*, "and thereupon he shall pay the defendant's costs of the action as a "judgment" of the Court sufficient to satisfy the requirements of Order XLII., Rule 9.* See the note to Rule 1 of this Order, *supra*.

ORDER XXIV. REPLY AND SUBSEQUENT PLEADINGS.

Rule 1.

A plaintiff shall deliver his reply, if any, within three weeks after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or a Judge.

This is a salutary amendment of the law. It is not a little curious that at Common Law hitherto there has been *no limit at all* to the time within which a plaintiff might reply, except that one month's notice must have been given, if a year had elapsed since the last pleading.† In order to compel a plaintiff to reply at all, it was necessary for the defendant to give the plaintiff notice to proceed within four days, "otherwise judgment."‡

In Equity a replication must have been filed within four weeks after the answer, or *the last* of the answers required to be put in by the defendant, or, where the plaintiff had undertaken to reply to a plea, within four weeks after the date of his undertaking; or, where a traversing note had been filed, within four weeks after the filing of the traversing note; or, where he had amended his Bill without requiring an answer, within one week after the expiration of the time within which the defendant might have answered, but did not desire to answer, or within fourteen days after the refusal of further time to put in an answer, or within fourteen days after the filing of the answer, unless the plaintiff had within such fourteen days obtained a special order to except to such answer or to re-amend the Bill.§

If the plaintiff at Common Law was not ready to reply within the four days limited by the notice to proceed, he might have obtained further time by summons. The plaintiff in Equity might also have applied by motion or summons for an order to enlarge the time for filing his replication.

While the present Rule fixes three weeks as the time within which a replication must usually be delivered, it carefully preserves the right to apply for an extension of time. See Order LVII., Rule 6, *infra*, as to the enlargement of time.

The plaintiff having allowed the three weeks limited by this Rule to elapse without delivering his reply, or obtaining an extension of time, the defendant applied before the expiration of the six weeks, within which the plaintiff must, under Order XXXVI., Rule 4, give notice

* *Bolton v. Bolton*, 3 Ch. D., 276; 35 L. T., 358; 24 W. R., 663.

† Reg. Gen., Hil. T., 1853, R. 176.

‡ Common Law Procedure Act, 1852, s. 53.

§ Consolidated Orders of the Court of Chancery, Order XXXIII., 10, (1) (2); 12, (1) (2) (3).

of trial, that the action might be dismissed with costs, on the ground that, by not replying, the plaintiff had admitted the defence,* so as to entitle the defendant to an order under Order XL., Rule 11. Vice-Chancellor Hall decided that the motion was misconceived, and must be refused with costs. A defendant seeking to dismiss an action under such circumstances was not, in his lordship's opinion, a party applying for "relief" under Order XL., Rule 11. His lordship, however, added that, if the plaintiff did not, within six weeks after the close of the pleadings, give notice of trial, the defendant might give notice of trial,† or might, under Rule 4a of Order XXXVI., move to dismiss the action for want of prosecution.‡

Order XXIV.,
Rule 1.

In the opinion of Vice-Chancellor Bacon,§ new facts should not, as a rule, be stated in the reply, but be introduced, by way of amendment, into the statement of claim. This is, no doubt, the view taken by the new Acts themselves, wherever it would have been necessary to *new assign* under the old procedure.|| It is also in accordance with the 19th Rule of the XIXth Order, that no pleading is (except by way of amendment) to raise any new ground of claim, or contain any new allegation of fact *inconsistent* with the previous pleadings of the party pleading it. But the decision of Vice-Chancellor Bacon, in a subsequent case, in which his lordship attempted to carry his view a step further, viz., that *all* new facts must be introduced by way of amendment of the statement of claim, was overruled by the Court of Appeal, which held that a plaintiff may, in a proper case, *reply specially*.¶

Rule 2.

No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a Judge, and then upon such terms as the Court or Judge shall think fit.

By requiring that the "leave of the Court or a Judge" should be necessary in order to "plead subsequent to reply," an obstacle is interposed in the way of protracted pleadings. The alternate allegations of fact after the "replication" are known as the "rejoinder," "surrejoinder," "rebutter," and "surrebutter." "After the surrebutter," says Mr. Stephens,** "the pleadings have no distinctive names; for, beyond that stage, they are very seldom found to extend."

The present Rule is founded on the recommendations of the Judicature Commission:—"The pleadings should not go beyond the reply, save by special permission of a Judge."††

"Without leave of the Court or a Judge." These words imply that a reply may contain something which may render further pleading neces-

* Order XXIX., Rule 12. † Order XXXVI., Rule 4.

‡ *Litton v. Litton*, 3 Ch. D., 793; 24 W. R., 962.

§ *Earp v. Henderson*, 3 Ch. D., 254; 45 L. J. (Ch.), 738; 34 L. T., 844; *The London and St. Katherine Docks Company v. The Metropolitan Railway Company*, 35 L. T., 733; W. N., 1876, p. 272.

|| Order XIX., Rule 14.

¶ *Hall v. Eve*, 4 Ch. D., 341; 46 L. J. (Ch.), 145; 35 L. T., 735; 25 W. R., 177.

** Principles of Pleading, p. 55, 6th ed. †† First Report, p. 11.

Order XXIV., Rule 2. sary. Per Baggallay, L.J., in *Hall v. Eve*.^{*} "The plaintiff," said Bramwell, L.J., in the same case, "is entitled to reply specially, and also to traverse statements made by the defendant. Order XXIV., Rule 2, seems decisive on that point, for it imports that the reply may be other than a joinder of issue." The note to Form No. 9, in App. (C) had been much relied upon by Bacon, V.C., in *Earp v. Henderson*,[†] as shewing that the plaintiff should introduce new facts by way of amendment of the statement of claim, and not by way of special reply.

In *Earp v. Henderson* the plaintiff joined issue generally on the defendant's statement of defence, and then went on to reply specially by way of confession and avoidance. Counsel for the plaintiff cited a distinct authority for this in Form No. 6 of App. (C); but Vice-Chancellor Bacon, nevertheless, considered it a vicious style of pleading. In *Hall v. Eve* the plaintiff adopted a different style of pleading, first replying specially to a portion of the defence, and then joining issue on the defence generally, "except as hereinbefore appears." Counsel for the plaintiff pointed out that there was a distinct authority for this in Form No. 21 of App. (C); but Vice-Chancellor Bacon, nevertheless, held that this, also, was a vicious style of pleading. His lordship, however, in *Hall v. Eve*, was, as already stated, overruled by the Court of Appeal, which thus, in a remarkable manner, vindicated the old system of pleading at Common Law. Lord Justice James, although a Chancery lawyer, observed, that it was contended that the plaintiff ought to have said what he had to say by amending his statement of claim; that seemed to him a most illogical proceeding; it would be a return to the old Chancery practice of inventing defences in the Bill in order to meet them with charges.

From various reports of the decision in *Earp v. Henderson*, it would appear that the Vice-Chancellor read the note to Form No. 9 of App. (C) as laying down a universal proposition, thus:—"The facts [which, under the old system of pleading, would have been] stated in reply, should [now], in general, be introduced by amendment into the statement of claim." Lord Justice Baggallay, however, in *Hall v. Eve* (in which Counsel for the defendants relied upon this note), pointed out that the note did not lay down any universal proposition, but merely said that "the facts stated in this reply (i.e., the reply in Form No. 9) should, in general, be introduced by amendment into the statement of claim."

Leave to rejoin specially was refused in *Norris v. Beazley*[‡] by the Common Pleas Division.

Rule 3.

Subject to the last preceding Rule, every pleading subsequent to reply shall be delivered within four days after the delivery of the previous pleading, unless the time shall be extended by the Court or a Judge.

"Subject to the last preceding Rule," i.e., subject to leave to plead subsequently to the reply being given.

Under the previous practice the defendant might have been called upon,

^{*} 4 Ch. D., 341; 46 L. J. (Ch.), 145; 35 L. T., 735, 926; 25 W. R., 177.

[†] 3 Ch. D., 254; 45 L. J. (Ch.), 738; 34 L. T., 844.

[‡] 35 L. T., 845.

by notice from the plaintiff, to rejoin; the plaintiff by notice from the defendant to surrejoin; the defendant by notice from the plaintiff to rebut; and the plaintiff by notice from the defendant to surrebut, *within*, in every case, *four days*, otherwise judgment, under the provisions of the 53rd section of the Common Law Procedure Act, 1852.

Order XXIV.,
Rule 3.

See *Hall v. Eve*,* cited under Rules 1 and 2 of this Order, *supra*.

In *Ellis v. Munson*,† the defendant, after issue joined, obtained leave to amend his statement of defence, and delivered a defence and counterclaim, founded on facts which had arisen after action brought, as if they had arisen before action brought. The plaintiff, instead of taking out a summons to strike out this defence and counterclaim, unless it were so amended as to make it appear that the facts which supported it arose after action brought, replied to it specially, and the defendant did not deliver any rejoinder. Held, by the Court of Appeal, affirming the decision of the Divisional Court of the Queen's Bench Division, that the Master was right in allowing the plaintiff to sign judgment for default of pleading. The Court of Appeal, at the same time, pointed out that the defendant should have pleaded the matter arising after action brought *puis darrein continuance*, under Order XX., Rule 2, so as to give the plaintiff an opportunity of confessing the defence and counterclaim, and signing judgment for costs up to the time of pleading it, and the Court (to put an end to further "legal finesse") placed the parties in exactly the same position as if the defendant had pleaded the matter arising after action brought *puis darrein continuance*, and the plaintiff had confessed it, accordingly; the plaintiff to have the costs of the appeal.

ORDER XXV.

CLOSE OF PLEADINGS.

As soon as either party has joined issue upon any pleading of the opposite party simply without adding any further or other pleading thereto, the pleadings as between such parties shall be deemed to be closed.

The ordinary form of joinder of issue in the Forms in Appendix (C) is as follows:—"The plaintiff joins issue with the defendant upon his defence or his statement of defence," the joinder of issue being the reply, and being generally to *the whole* of the defence, not to any particular plea or part of the defence. Occasionally, however, issue is joined by the defendant on specific paragraphs of the plaintiff's reply. See instances, Forms No. 12 and No. 21. Compare the forms of joinder of issue given by the Common Law Procedure Act, 1852, section 79.

In Equity, the cause was "deemed to be completely at issue upon filing the replication."‡

By Order XXIX., Rule 12, "if any party does not deliver any proceeding subsequent" [to reply] within the period allowed for that purpose,

* 4 Ch. D., 341 ; 46 L. J. (Ch.), 145 ; 35 L. T., 735, 926 ; 25 W. R., 177.

† W. N., 1876, p. 253 ; 35 L. T., 585. Compare *Twycross v. King*, 6 Q. B., 663.

‡ Daniel's Chancery Practice, p. 732.

Order XXV. the pleading shall be deemed to be closed at the expiration of that period, and the statements of fact in the pleading last delivered shall be deemed to be admitted. If, *e.g.*, the rejoinder be not delivered within four days of the reply, the reply is to be deemed to be admitted and the pleadings to be closed.

In *Earp v. Henderson*,* the defendant, after notice of trial had been given by the plaintiff, took out a summons on the 16th of June for leave to join issue on the plaintiff's reply, which had been delivered on the 10th of February; and although the plaintiff's Counsel contended that the pleadings must be deemed to be closed, and that it would practically "abrogate" the present Order to allow so late an application, the Vice-Chancellor, observing that the Court had ample power of enlarging the time,† acceded to the application. It would, however, be unsafe for any defendant to rely upon this decision, as it was founded upon the questionable view of the Vice-Chancellor that the reply of the plaintiff was bad (he having first joined issue generally and then replied specially), and that his lordship was consequently justified in extending to the defendant the indulgence of joining issue, even at so late a period, on this bad reply.‡

ORDER XXVI.

ISSUES.

Where in any action it appears to a Judge that the statement of claim or defence or reply does not sufficiently define the issues of fact in dispute between the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the Judge.

This Rule is a re-enactment of Rule 19 of the Principal Act.

This Rule contains a curious reproduction of a rule which prevailed during the infancy of our system of pleading, viz., that the pleadings should be settled, and the issue evolved in presence of the Judge, and with his sanction, in open Court. Any one who wishes to refer to this ancient rule of pleading will find abundant illustrations of it in the Year Books.

In *Wood v. The Anglo-Italian Banking Company, Limited*,§ the Common Pleas Division directed that issues should be framed under this Order, for the purpose of trying a preliminary question under Order XXXI., Rule 19.

ORDER XXVII.

AMENDMENT OF PLEADINGS.

Rule 1.

The Court or a Judge may, at any stage of the pro-

* 3 Ch. D., 254; 45 L. J. (Ch.), 738; 34 L. T., 844.

† See Order LVII., Rule 6.

‡ The reasoning of Bacon, V.C., in *Earp v. Henderson*, has been a good deal shaken by the decision of the Court of Appeal in *Hall v. Eve*, 4 Ch. D., 341; 46 L. J. (Ch.), 145; 35 L. T., 735, 926; 25 W. R., 177.

§ 34 L. T., 255; *Times*, Feb. 19th, 1876. See, also, *West v. White*, 4 Ch. D., 631; 25 W. R., 342; 36 L. T., 95.

ceedings, allow either party to alter his statement of claim or defence or reply, or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass,* or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties.

Order XXVII.,
Rule 1.

This Rule is a re-enactment of the fourth part of Rule 18 of the Principal Act.

Amendments in case of mis-joinder or non-joinder of parties have been already treated of in the notes to Order XVI., Rules 1 and 13, *supra*.

The present Rule is founded on sections 52 and 222 of the Common Law Procedure Act, 1852, section 96 of the Common Law Procedure Act, 1854, and section 36 of the Common Law Procedure Act, 1860.

Fines for "*sham pleading*" once formed a source of revenue to the Crown.† It has always been strongly reprobated by the Judges, and they allowed the plaintiff, when the defendant had recourse to it, to sign judgment as for want of plea, long before the passing of the Common Law Procedure Acts.‡

Even before the Common Law Procedure Acts, the plaintiff at Common Law was allowed to strike out a count of the declaration,§ and add a new one,|| or increase the damages,¶ &c., or add to the number of,** or strike out, parties named in the declaration,†† but it was not till after the Common Law Procedure Acts were passed, that the plaintiff was allowed to add a new count containing a new substantive cause of action.‡‡

Before the Common Law Procedure Acts, the defendant at Common Law might in general have obtained leave to amend by adding a further plea, if necessary for his defence, or if it were a matter of doubt whether it was so or not. And a plea might have been allowed to be added after verdict, and a new trial granted.§§

After the Common Law Procedure Acts were passed, the Common Law Courts and Judges might "at all times" have allowed a plea to be added.

Ample opportunity was given to a plaintiff in Equity to amend his Bill.¶¶ If a defendant desired to correct his answer after it had been filed, he had to file a supplemental answer. See *Wells v. Wood*.¶¶¶

* This word, as used here, means bringing forward a defence which the party is not entitled to make use of. Per Jessel, M.R., in *Heugh v. Chamberlain*, 25 W. R., 742; W. N., 1877, p. 128.

† Com. Dig., "Perogative," D. 22.

‡ Day's Common Law Procedure Acts, pp. 85, 86.

§ *Aylwin v. Todd*, 1 Bing., N.C., 170.

|| *Brown v. Crump*, 6 Taunt., 300. ¶ *Dew v. Katz*, 8 C. and P., 315.

** *Lakin v. Watson*, 2 Dowl., 633. †† *Holmes v. Pinney*, 6 Dowl., 627.

‡‡ Archbold's Practice, pp. 239, 240; *Smith v. Dixon*, 4 Dowl., 571.

§§ See *Kirby v. Simpson*, 3 Dowl., 791.

¶¶ See Order IX. (II.) of the Consolidated Orders of the Court of Chancery.

¶¶¶ 10 Ves., 401.

Order XXVII,
Rule 1.

"I think," said Vice-Chancellor Bacon,* "that the enlarged power of amendment given to the Court by the Judicature Acts is one of the most useful and beneficial which has ever been conferred upon the Court. It is against justice that a man should not be at liberty to bring his case forward in the way he thinks best, or that he should be precluded from bringing before the Court those materials which he considers necessary for the proper prosecution of his case."

The Court of Appeal has decided that, except in very extreme cases where serious injustice would be done, it will not interfere with the discretion exercised by a Judge under the present Rule. The leading cases on this subject are *Golding v. The Wharton Railway and River Salt Works Company, Limited*;† and *Watson v. Rodwell*.‡ In the former case, which was one *prima impressionis*, Mellish, L.J., made a very full and distinct exposition of the principles on which the Court of Appeal would proceed, and his colleagues, James and Baggallay, L.JJ., expressed their concurrence with his views. "As this," said his lordship, "is the first appeal which has been brought before us from an order made on an application of the present kind, it is desirable that the Court should state the principles on which it is intended to act. The Court of Appeal in Chancery—when appeals were brought on matters of practice which were within the discretion of the Judge of the Court below—over and over again laid down that, though it had jurisdiction to deal with such matters, still, as a general rule, it would not interfere with the way in which the Judge in the Court below had exercised his discretion. Now that the right of appealing from interlocutory orders made by the Common Law Divisions has been given, it is desirable that it should be clearly known that the present Court of Appeal intends to act in all cases on the same principle as the Court of Appeal in Chancery formerly acted. In special cases, where serious injustice would result from not interfering, the Court has ample jurisdiction to interfere, and will do so; but in ordinary cases it will not interfere. In the Common Law Divisions, unfortunately, an application of this kind first came before the Master; then, having been refused by him, it came before the Judge, at chambers; then there was an appeal before the Divisional Court; and finally it came before the Court of Appeal. If in every case these four successive proceedings were to be gone through, it would be impossible for actions to be tried at all. We, therefore wish, as far as possible, to discourage such appeals." In *Watson v. Rodwell*, the views expressed by Mellish, L.J., in *Golding v. The Wharton Railway and River Salt Works Company, Limited*, were reaffirmed by the Court of Appeal, and with increased emphasis, for the Court upheld the decision of Malins, V.C., although they disagreed with his reasons, and considered the statement of claim which he sanctioned as prolix and involved.

With regard to the exercise of a discretion by the Court or Judge in the first instance, Vice-Chancellor Bacon has, in some recent cases,§ laid down the principle that the question of *the materiality* of a proposed amendment was not for him, but *for the Counsel*, on whose advice the application for leave to amend was made. "By the Judicature Acts, I am relieved," said his lordship, "from the necessity of inquiring into the materiality of the proposed amendment."

* In *The Chesterfield Company v. Black*, 25 W. R., 409. See, also, *Morgan v. Green*, 11 N. C., 222, also before Bacon, V.C.

† 1 Q. B. D., 374; 34 L. T., 474; 24 W. R., 423.

‡ 3 Ch. D., 380; 45 L. J. (Ch.), 744; 35 L. T., 86; 24 W. R., 1009.

§ See *The Chesterfield Company v. Black*, 25 W. R., 409, and *Morgan v. Green*, 11 N. C., 222.

In *Cargill v. Bower*,* the Counsel for the plaintiff submitted that the defendant, before obtaining leave to amend his defence, must file an affidavit stating the grounds upon which he proposed to amend his defence, and the nature of the amendments, as under the old Chancery practice, no alteration in which had been specifically directed. Malins, V.C., however, took the opposite view, that, no allusion being made to the old form of affidavit, no such affidavit was required.

**Order XXVII.,
Rule 1.**

"The Court or a Judge at any stage of the proceedings." See Rule 6 of this Order, *infra*, which would seem to be an amplification of these words.

"Scandalous statements." This is a phrase imported into the Supreme Court with the Court of Chancery. Scandal in Equity consists in the allegation of anything which it is unbecoming the dignity of the Court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shewn in the cause.† Nothing material, however, is scandalous.‡

Scandal in pleadings before the Court might have been excepted to, at any stage of the suit,§ and upon the production of an order allowing the exceptions, it was the duty of the officer having the custody of the pleading to expunge such parts of it as the Court held to be scandalous.|| Costs were generally given to the party aggrieved by the scandalous matter.

As to striking out scandalous statements, see *Duncan v. Vereker*.¶ To an action on a voluntary bond the defendant pleaded fraud, and gave details of cohabitation and false representation. Eight paragraphs in the statement of defence were struck out by Archibald, J., at chambers, as scandalous. "Matter of this sort," said his lordship, "is not fit to appear on the pleadings."

In *Blake v. The Albion Life Assurance Society*,** the plaintiff, in effect, charged the defendants with having conspired with one Howard to defraud the plaintiff of £59. 6s. 3d., by representing Howard as a person unconnected with the defendants, who was willing to lend the plaintiff £1,500 on his effecting a policy on his life with the defendants, for which the plaintiff had to pay a premium of £59. 6s. 3d.; that Howard was a mere agent of the defendants, and that there was never any intention to lend any money at all, but that the whole affair was a contrivance to get the premium paid, which the defendants, as it was alleged, divided with Howard. The plaintiff also alleged that "*the business of the defendants consisted in getting premiums in this manner.*" An application, under the present Rule, to have the paragraphs stating that "the business of the defendants consisted in getting premiums in this manner" struck out, as scandalous and irrelevant, was granted by the Common Pleas Division.

In the following cases the application to strike out matter as embarrassing was successful:—

Quain, J., at chambers, decided that, in an action of slander, the defendant may plead together pleas equivalent to "not guilty," and a plea in justification. Part of the plea in justification was, under the

* 4 Ch. D., 78; 46 L. J. (Ch.), 175; 35 L. T., 621; 25 W. R., 221.

† Wyatt's P. R., 383. ‡ Daniel's Chancery Practice, p. 290.

§ *Ellison v. Burgess*, 2 P. Wms., 312 n.

|| Order XVI., Rule 4, of the Consolidated Orders of the Court of Chancery.

¶ 2 Charley's Cases (Chambers), 44.

** 45 L. J. (C.P.), 663; 24 W. R., 677; 35 L. T., 269.

Order XXVII., present Rule, struck out, however, by his lordship, as embarrassing.*
Rule 1. The paragraph substituted for the paragraph struck out was also, under the present Rule, struck out as embarrassing by Quain, J., at chambers. In pleading justification in an action the very words of slander alleged to have been uttered should be used.†

The plaintiff is not entitled to plead in his statement of claim that the point in dispute has been admitted by the defendants in letters to the plaintiff's solicitors; a paragraph in a statement of claim to the effect that "the defendants have, in their letters to the plaintiff's solicitors, admitted that," &c., was, accordingly, struck out as embarrassing by Quain, J., at chambers.‡

A paragraph in a statement of claim, alleging that the plaintiff was "so informed" by the defendant, was struck out as embarrassing and improper. The plaintiff might have stated, as a fact, the matter of which he alleged that he was "so informed."§

A paragraph in the statement of defence, which set out matters that were alleged to be equivalent to a release from an agreement, was struck out by Archibald, J., at chambers, on the ground that the defendant should have demurred.||

In an action for malicious prosecution paragraphs in the statement of claim, that set out facts which the plaintiff said did not amount to reasonable and probable cause, were struck out by Archibald, J., at chambers; the plaintiff should simply have stated that there was no reasonable and probable cause.¶

To an action by a company on a promissory note, the defendant pleaded, by way of set-off and counterclaim, a payment in respect of scrip in the company. Archibald, J., at chambers, decided that the defendant shewed a claim merely to shares and not to money, and that this part of the defence must be struck out, or amended.**

In the above cases, part only of the pleadings was struck out. The leading case on the power of the Court or a Judge to strike out *the whole of a statement of claim*, is *Cashin v. Cradock*.†† The subject-matter of the action was the sale of certain collieries by one of the defendants to the London and Brighton Cheap Coal Supply Company, Limited, and serious charges of fraud and collusive conduct were brought by the plaintiff (who alleged that he was interested in the sale) against several of the defendants. The statement of claim was an amateur performance, extending to the enormous length of sixty-four paragraphs, and was so confused and unintelligible that it was impossible to ascertain what the real ground of complaint was. Bacon, V.C., acceded to the motion of the defendants that the whole of the statement of claim should be struck out, under the present Rule, as tending to prejudice, embarrass, and delay the fair trial of the action; as being an abuse of the practice of the Court, and as being oppressive to the defendants. The plaintiff appealed, on the ground

* *Restell and Wife v. Steward*, 1 Charley's Cases (Chambers), 87.

† *Restell and Wife v. Steward*, 1 Charley's Cases (Chambers), 89.

‡ *Askew v. The North Eastern Railway Company*, 1 Charley's Cases (Chambers), 90.

§ *Jones v. Turner*, 1 Charley's Cases (Chambers), 91.

|| *Menhinnick v. Turner*, 2 Charley's Cases (Chambers), 42.

¶ *Aderis v. Thrigley*, 2 Charley's Cases (Chambers), 43.

** *Cadogan Advance Company, Limited, v. Shepherd*, 2 Charley's Cases (Chambers), 44.

†† 3 Ch. D., 376; 35 L. T., 452; 25 W. R., 4.

that the present Rule did not give the Court or Judge power to strike out *the whole* of a statement of claim, but the majority of the Court of Appeal (James and Mellish, L.JJ., Baggallay, L. J., *dubitante*) dismissed the appeal with costs. Order XXVII.,
Rule 1.

In *Finch v. The Guardians of the York Union*,* the plaintiffs moved to strike out *the whole of the statement of defence*, but the Queen's Bench held that the motion was misconceived—the plaintiff ought to have demurred.

In *Bagot v. Easton*,† Bacon, V.C., ordered one of two inconsistent claims to be struck out as embarrassing.

In the following cases the application to strike out matter as embarrassing was unsuccessful:—

In an action for an alleged breach of an agreement to take an assignment of a lease of a house, the plaintiff set out letters between the parties, and alleged that they contained the agreement; and Lindley, J., refused to strike out the statement of claim as embarrassing.‡

In an action for breach of a contract to deliver as much salt as the plaintiff should require for three months, an application to strike out from the statement of defence as embarrassing a paragraph which alleged that the plaintiff's requisitions (480 tons a week) were unreasonable, and that the contract was entered into with the plaintiff in a different capacity from that which appeared by the contract itself, was refused by Lindley, J., at chambers.§ This decision was affirmed, on appeal, by the Divisional Court of the Queen's Bench Division, and, on appeal from that Court, by the Court of Appeal, as already stated.

Lindley, J., at chambers, decided that, where unobjectionable, inconsistent pleas may still be employed, as under the old system of pleading (*e.g.*, that the money was never lent, and that the defendant has paid it back, and that the plaintiff has released the defendant); and his lordship refused to strike out a statement of defence in which these inconsistent pleas were inserted.||

To an action by a plaintiff company for slander by the defendant in imputing to it insolvency, in two conversations respectively set out in paragraphs 2 and 3 of the statement of claim, the defendant set up facts to shew that the conversation mentioned in paragraph 2 was privileged; and as to paragraph 3, pleaded—(1) a denial that any such conversation took place; (2) that another and a different conversation took place at another time, and that that conversation was privileged. The Exchequer Division refused to strike out paragraphs 2 and 3 as embarrassing.¶

*Heap v. Marris*** was an action to enforce an agreement, dated December, 1872, by which the defendant promised to marry the plaintiff on the 1st of January, 1875, or to pay him a third of whatever money she might receive under her parent's will, and also to pay the plaintiff an annuity of £20 from the 1st of January, 1875, to be doubled each year after until she married the plaintiff. To this singular statement of claim the defendant pleaded the various grounds on which Equity gives relief

* 35 L. T., 360. † W. N., 1877, p. 176.

‡ *Hope v. Banks*, 2 Charley's Cases (Chambers), 40.

§ *Golding v. The Wharton Railway and River Salt Works Company*, 2 Charley's Cases (Chambers), 40.

|| *Barnicott v. Hann*, 2 Charley's Cases (Chambers), 39.

¶ *The Colonial Assurance Company v. Prosser*, 11 N. C., 108.

** 12 N. C., 72.

Order XXVII., Rule 1. against bargains with heirs expectant; and the Divisional Court for the Common Law Divisions refused to strike out the defence as embarrassing.

Vice-Chancellor Hall, in *Rolfe v. Maclaren*,* characterised as "idle" an application, under this Rule, by a defendant, to have a reply, joining issue generally on a counterclaim, instead of dealing specifically (as provided by Order XIX., Rule 20) with the allegations contained in it, struck out as embarrassing, or amended. "I cannot," said his lordship, "allow the defendant to amend the plaintiff's pleadings as he thinks fit."†

Facts and evidence are in many cases so mixed up as to be undistinguishable. Particulars of a paragraph in the statement of defence were ordered by Archibald, J., at chambers, to be given, instead of striking it out.‡

Regarding the striking out of pleadings as rather a severe remedy, Lindley, J., in two reported cases, ordered the pleadings to be amended, instead of striking them out. In an action for unlawful distress, the decision of the Master, striking out the statement of claim for prolixity and obscurity, was reversed by Lindley, J., at chambers, and the plaintiff was ordered to amend it, and pay the costs of the application.§ In an action of trespass, the Master having ordered a statement of claim to be delivered, the plaintiff delivered a copy of the indorsement on the writ, and Lindley, J., refused to strike it out. "It is an informal statement," said Mr. Justice Lindley, "but it need not be *struck out*;" and his Lordship ordered the statement to be *amended*.||

See, also, *Harris v. Gamble*.¶

As to amending the pleadings with a view to "determining the real question in controversy," see *Barnicott v. Hann*.** In an action by executors for rent, due partly for freehold and partly for leasehold premises, the statement of claim was ordered to be amended by stating the title (if any) of the plaintiffs to the freehold, and the amounts and dates of the rent claimed.

In *Roe v. Davies*,†† which was a Chancery suit, commenced in 1874, and at issue before the 1st of November, 1875, to set aside a voluntary settlement made by the plaintiff, Bacon, V.C., "for the purpose of determining the real question in controversy" between the parties, allowed the plaintiff, in April, 1876, to amend her Bill under the present Rule, with a view to showing that she was suffering from mental incapacity at the time that she executed the settlement, the defendant's Counsel vainly protesting that the amendment raised an entirely new case.

An admittedly new case was allowed to be set up, under the wide powers of amendment given by this Rule, by Jessel, M.R., in *Budding v. Murdoch*.‡‡ In his Bill the plaintiff rested his title to the flow of water

* 3 Ch. D., 106; 24 W. R., 816.

† The effect of merely joining issue generally on the defendant's counterclaim operated, under Order XIX., Rule 17, as an admission of the facts contained in it; and plaintiff's Counsel argued that, if he chose to take the consequences of joining issue generally, he had a "perfect right" to do so.

‡ *Smith v. West*, 2 Charley's Cases (Chambers), 41.

§ *Moorhouse v. Colville*, 1 Charley's Cases (Chambers), 95.

|| 2 Charley's Cases (Chambers), 39. ¶ W.N., 1877, p. 142; 12 N.C., 133.

** 1 Charley's Cases (Chambers), 93.

†† 2 Ch. D., 729; 24 W. R., 606.

‡‡ 1 Ch. D., 42; 45 L. J. (Ch.), 213; 24 W. R., 23.

along an artificial watercourse, on (1) a deed, and (2) prescription. On motion for decree, the Court held that the title set up failed as to both of these grounds. The plaintiff then alleged acquiescence by a predecessor in title of the defendant in the construction of the watercourse by the plaintiff; and the Court gave the plaintiff leave to amend for the purpose of setting up this new case.

**Order XXVII.,
Rule 1.**

Under the old practice, an amendment, converting a Bill in Chancery into an information and Bill, could have been made without rendering the suit a new one, so as to amount to an abandonment of a pending motion.* This practice is, *mutatis mutandis*, applicable under the new system of pleading. In *Caldwell v. The Pagham Harbour Reclamation Company*,† the plaintiffs were allowed, by Hall, V.C., after the delivery of the statement of defence, to amend their writ and statement of claim by adding the name of the Attorney-General, with his assent, as informant at their relation, without prejudice to a notice of motion, served with the writ in the action, for an injunction to restrain the defendants from erecting certain works for the reclamation of an arm of the sea in a manner alleged to be in violation of an Act of Parliament.

Leave to amend at the hearing was refused by Jessel, M.R.,‡ in an administration suit commenced before the 1st of November, 1875. "The plaintiff ought to have amended his bill when the answer came in."

In an action for false representations with regard to debentures, stated to have been made in a letter and a prospectus, Huddleston, B., at chambers, refused to order the statement of claim to be amended so as to show which of the false representations were contained in the letter and which in the prospectus, this being matter of evidence.§

It does not follow that, because the allegations are such as would not have been improper under the old system of pleading, they will be allowed now. For instance, the charging parts in the old Bill in Chancery, which were merely statements of the pleader's view of the equity, ought now to be omitted.||

Rule 2.

The plaintiff may, without any leave, amend his statement of claim once at any time before the expiration of the time limited for reply¶ and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant, who shall have last appeared.

Amendment by the plaintiff without leave is a new method of amendment at Common Law. The rule there, previously, was that parties

* *Mounsey v. The Earl of Lonsdale*, L. R., 6 Ch., 141.

† 2 Ch. D., 221; 24 W. R., 690.

‡ *Offord v. Offord*, 10 N. C., 179; 1 Charley's Cases (Court), 102.

§ *Weir v. Barnett and others*, 1 Charley's Cases (Chambers), 93.

|| Per Mellish, L.J., in *Watson v. Rodwell*, 3 Ch. D., 380: 45 L. J. (Ch.), 744; 35 L. T., 86; 24 W. R., 1009.

¶ Three weeks from the delivery of the defence.

Order XXVII., could not amend their own proceedings ; the leave of the Court or a Judge
Rule 2. was necessary.*

See, however, Order XXVIII., Rule 7, and the note thereto.

As to the course which may be pursued by the defendant, if the plaintiff avails himself of this Rule, see Rules 4 and 5 of this Order, *infra*.

Rule 3.

A defendant who has set up in his defence any set-off or counterclaim may, without any leave, amend such set-off or counterclaim at any time before the expiration of the time allowed him for pleading to the reply,† and before pleading thereto, or in case there be no reply, then at any time before the expiration of twenty-eight days from the filing of his defence.

Amendment by the defendant without leave is new.

“Twenty-eight days.” Twenty-eight days, as we have seen, from the delivery to him of a copy of the plaintiff’s interrogations, was the period allowed by the Court of Chancery to the defendant for putting in his plea, answer or demurrer to a Bill.

“Pleading to the reply.” See, as to the reply, Order XXII., Rule 8, *supra* ; and as to the right generally of the defendant to set up a counterclaim, see subsection (3) of section 24 of the Principal Act, and Order XIX., Rule 3, *supra*.

As to the course which may be pursued by the plaintiff, if the defendant avails himself of this Rule, see Rules 4 and 5 of this Order, *infra*.

Rule 4.

Where any party has amended his pleading under either of the last two preceding Rules, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the Court or a Judge to disallow the amendment, or any part thereof, and the Court or Judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may seem just.

Although leave is not necessary to amend under Rules 2 and 3, leave is necessary under this Rule to the disallowance of the amendment.

* See *Siggers v. Sansom*, 2 Dowl., 745 ; *Bate v. Bolton*, 4 Dowl., 677
Wright v. Skinner, 5 Dowl., 92.

† Four days from the delivery of the reply.

"Any party," *i.e.*, the plaintiff under Rule 2, the defendant under Order XXVII., Rule 3. Rule 4.

"The opposite party," *i.e.*, the defendant, if the case falls under Rule 2, the plaintiff, if the case falls under Rule 3.

"To a Judge," *i.e.*, to a Master at chambers, on summons.*

Rule 5.

Where any party has amended his pleading under Rules 2 or 3 of this Order the other party may apply to the Court or Judge for leave to plead or amend his former pleading within such time and upon such terms as may seem just.

See the notes to Rules 2 and 3 of this Order, *supra*.

"Any party," *i.e.*, the plaintiff under Rule 2, the defendant under Rule 3.

"The other party," *i.e.*, the defendant, if the case falls under Rule 2, the plaintiff, if the case falls under Rule 3.

"To a Judge," *i.e.*, to a Master at chambers, stating the amendment sought.†

Rule 6.

In all cases not provided for by the preceding Rules of this Order, application for leave to amend any pleading may be made by either party to the Court or a Judge in chambers, or to the Judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may seem just.

The application to amend is generally made to a Master at chambers, by summons, calling upon the opposite party to show cause why the party applying should not have leave to amend, but there is an appeal first to the Judge, then to the Court, to which application also under special circumstances may be made, in the first instance. The amendment was, under the old system, generally allowed only "on payment of costs."‡

"In all cases not provided for by the preceding Rules of this Order." The application under Rule 1 would be in one of the three ways specified in this Rule. Rule 1 does "not provide for" the "*application* for leave," and therefore it is necessary to supplement it by the provisions of this Rule. Under Rules 2 and 3 no "*application*" is necessary. Under Rules 4 and 5 the "*application*" is "provided for."

* Coe's Practice of the Judges' Chambers, 86.

† *Ib.*

‡ *Wall v. Lyon*, 9 Bing., 411.

**Order XXVII.,
Rule 6.**

In the case of *King v. Corke*,* the plaintiff filed a Bill against the trustees of a voluntary settlement, praying that the trustees might be restrained from selling part of the property, and that the trusts might be carried out under the direction of the Court. After answer put in by the trustees the plaintiff amended his Bill, alleging mismanagement by the trustees and praying for an account against them, on the footing of wilful neglect or default, but not alleging any specific act of neglect or default. The cause came on on replication filed, and the plaintiff then asked leave to amend under the present Rule, to amend the Bill, by alleging any such specific act. Vice-Chancellor Bacon gave leave, on the terms that the plaintiff should not go into further evidence, and should pay the costs of the present hearing; the defendant to be at liberty to bring further evidence against the specific acts to be alleged.

"Costs." In *Cargill v. Bower*,† in which leave was given by Malins to one of several defendants to put in a separate and amended defence without any affidavit as to the nature of it, the defendant was ordered by Malins, V.C., to pay such reasonable costs of the plaintiff as the defendants as had been rendered necessary by his not at first putting in a full defence. The Court, however, allowed the plaintiff the costs of Counsel only, either senior or junior, as the plaintiff might think fit, there could be no justification for retaining, as the plaintiff had two Queen's Counsel and a junior on a merely formal application. The Lordship allowed the co-defendants only 40s. costs, as it would have been quite sufficient for them to have given a consent brief.

In cases in which the application is made at a late stage of the proceedings, e.g., after issue has been joined, the practice is to throw the party applying for leave the entire cost of the application.‡

Rule 7.

If a party who has obtained an order for leave to amend a pleading delivered by him does not amend the pleading within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of fourteen days, as the case may be, become *ipso facto* void, unless the time is extended by the Court or a Judge.

The party at Common Law who obtained an order was at liberty to act upon it, or to abandon it, at his option: if he chose the latter he might proceed as if the order had not been made.§

The present Rule will be useful in fixing the time within which

* 1 Ch. D., 57; 45 L. J. (Ch.), 190; 33 L. T., 375; 24 W. R., 23.

† 4 Ch. D., 78; 46 L. J. (Ch.), 175; 35 L. T., 621; 25 W. R., 2.

‡ See e.g., *The Chesterfield Company v. Black*, 25 W. R., 409; *Morgan v. Green*, 11 N. C., 222.

§ *Black v. Sangster*, 1 C. M. & R., 521. See *Pugh v. Kerr*, 6 M. & W.

party who has obtained the order must make up his mind whether he will avail himself of it or not. Order XXVIII.,
Rule 2.

The Rule is copied from Order IX., Rule 24, of the Consolidated Orders of the Court of Chancery:—"Where the plaintiff obtains an order for leave to amend his Bill, and does not amend the same within the time thereby limited for that purpose, or if no time is so limited, then within 14 days from the date of such order, such order to amend becomes void."*

The party will be deprived of the right of obtaining a second order by the present Rule.

"Fourteen days." In the case of *King v. Corke*,† cited under the preceding Rule of this Order, Vice-Chancellor Bacon gave the plaintiff leave to amend under that Rule, on condition that he amended "within fourteen days," as prescribed by this Rule.

Rule 8.

A pleading may be amended by written alterations in the pleading which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them in writing would render the pleading difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the pleading as amended.

This Rule is taken from Order IX., Rule 18, of the Consolidated Orders of the Court of Chancery.

"144 words," i.e., two folios of 72 words each. See Order XIX., Rules 5 and 5a, *supra*.

"Or are so numerous." It was decided in *John v. Lloyd*,‡ that although the amendments do not in any place exceed two folios, the Clerk of Records and Writs has a discretion to refuse to file the Bill without a reprint, if the amendments are numerous and complicated.

Rule 9.

"Whenever any pleading is amended, such pleading when amended shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in manner following, viz. : "Amended day of ."

* *Nicholson v. Peile*, 2 Beav., 497.

† 1 Ch. D., 57; 45 L. J. (Ch.), 190; 33 L. T., 375; 24 W. R., 23.

‡ L. R., 1 Ch., 64.

Order XXVII., This Rule is taken from Order IX., Rule 19, of the Consolidated Orders
Rule 9. of the Court of Chancery.

Rule 10.

Whenever a pleading is amended, such amended pleading shall be delivered to the opposite party within the time allowed for amending the same.

This Rule is taken from Order IX., Rule 20, of the Consolidated Orders of the Court of Chancery, with the addition of the words at the end, "within the time allowed for amending the same." As to the time so allowed, see Rule 7 of this Order, *supra*.

Rule 11.

The Court, or a Judge, may, at any stage of the proceedings, allow the plaintiff to amend the writ of summons in such manner, and on such terms, as may seem just.

This new Rule was added by Rule 6 of the Rules of the Supreme Court, February, 1876.

Order III., Rule 2,* enables a plaintiff, by leave of the Court or a Judge, to amend *the indorsement* on his writ, so as to extend it to some other cause of action or some additional remedy or relief. The present Rule is of more general application. It is founded upon s. 20 of the Common Law Procedure Act, 1852, which, however, contemplated leave being given by the Court or a Judge to the plaintiff to amend, on a hostile application by the defendant to set aside the writ as irregular.

ORDER XXVIII.

DEMURRER.

Rule 1.

Any party may demur to any pleading of the opposite party, or to any part of a pleading setting up a distinct cause of action, ground of defence, set-off, counterclaim, reply, or as the case may be, on the ground that the facts alleged therein do not show any cause of action, or ground of defence to a claim or any part thereof, or set-off, or counterclaim, or reply, or as the case may be, to which effect can be given by the Court as against the party demurring.

* See the note to that Rule, *supra*, for the former practice in amending the writ.

The only reference to a demurrer in the Schedule to the Principal Act is contained in the third part of Rule 18 (repealed), "A demurrer to any statement may be *filed* in such manner and form as may be prescribed by Rules of Court." Ord. XXVIII.;
Rule 1.

When a pleading is clearly bad in substance it is generally advisable to demur to it, as the judgment upon the demurrer will be final, and determine the cause or the part of the cause to which it relates in the simplest and cheapest manner.*

As to set-off and counterclaims, see Order XIX., Rule 3, and subsection (3) of section 24 of the Principal Act, *supra*.

"Any pleading, or any part of a pleading." This was the Common Law practice. See the Common Law Procedure Act, 1852, s. 50, and the Reg. Gen., Hil. T., 1853, Rule 17.

"Any cause of action to which effect can be given by the Court." The case of *Watson v. Hawkins*,† which throws light on these words, will probably tend to discourage a frequent use of demurrers to *separate paragraphs* in the pleadings under the new system. In that case, the plaintiff, in his statement of claim, which contained a great number of paragraphs, prayed for four distinct kinds of relief. The defendants demurred to the whole of two of the paragraphs of the statement of claim, and to parts of two other paragraphs, on the ground that they disclosed no cause of action against the defendants. Counsel for the defendants argued that the paragraphs demurred to must have been inserted to obtain relief No. (1) or relief No. (3), and it was clear that they were good ground for neither kind of relief, and were therefore demurrable. The Common Pleas Division, however, overruled the demurrers. "So long," said Lord Coleridge, C.J., "as a paragraph supports some one or more of the claims in the prayers, it is not demurrable. The plaintiff is not bound to assign such and such paragraphs to such and such a prayer; he states all the facts that he deems material, and then asks for such and such relief; and if each fact set out tends to show that he is entitled to some relief, *and that relief is asked for in one of the prayers*, the paragraph setting out that fact must stand." In this view Mr. Justice Archibald concurred. Mr. Justice Lindley concurred in the rule as laid down by Lord Coleridge, C.J., with the omission of the words in italics. In his view if the paragraph demurred to showed that the plaintiff was entitled to *any relief at all*, whether *such* relief was prayed for or not, the demurrer was bad.‡

The case of *Nathan v. Bachelor*§ will, probably, like the case of *Watson v. Hawkins*, tend to discourage the use of demurrers to separate paragraphs in the pleadings under the new system. In *Nathan v. Bachelor* the plaintiff demurred to one of the two paragraphs in the statement of defence, as insufficient in law. The Queen's Bench Division overruled the demurrer. The first and second paragraphs *taken together*, raised a good defence to the action, and the plaintiff could not, in the opinion of the Court, demur to a single paragraph as if it stood alone.||

* Bullen and Leake's Precedents of Pleading, p. 820, n. (a), 3rd ed.

† 24 W. R., 884.

‡ As the object of the present Order is to assimilate the Common Law to the Chancery practice, the contention of Lindley, J., would seem to be correct. § W. N., 1876, p. 172.

|| This decision is clearly in accordance with common sense. Order XIX., Rule 4, requires that "every pleading shall be divided into paragraphs." It would be absurd if the opposite party were allowed to pick out any particular paragraph and say, "This paragraph, standing alone, is insufficient in law."

Order XXVII., This Rule is taken from Order I.
Rule B. of the Court of Chancery.

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This new Rule was added by
Court, February, 1870.

Order III., Rule 2,* enables a
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* See the note to that
the writ.

Ord. XXVIII,
Rule 1.

The disfavour with which demurrers are regarded, under the new system, is well illustrated by the following amusing conversation in the Queen's Bench Division, related by the *Times*:—*

"On the first case being opened, which came before the Court on demurrer to portions of the plaintiff's statement of facts, Mr. Justice Mellor observed that the demurrers were what might be called "niggling demurrers"—that is, demurrers rather to the mode of stating the case than to the case itself, and Mr. Justice Quain quite concurred in the observation. Benjamin, Q.C., and Cohen, Q.C., the leading Counsel in the case, said that they quite agreed in this view, and proposed to strike out the "demurrers," except on the broad ground that the action was not maintainable, which was assented to, and the case, which turned on the construction of a contract, was argued and decided on that footing.

"The next case also came before the Court on demurrer to the statement of claim—the same Counsel being concerned in it. Benjamin, Q.C., said that the demurrers were "ridiculous," and the best way would be to strike them out and let the case go to trial, when the broad question could be raised upon the real facts—not the pleader's facts—whether the action was maintainable. Mr. Justice Mellor observed that this tended to show that demurrers had better be abolished altogether, the only really substantial ground of demurrer being that the action was not maintainable, which could be raised on the real facts stated in the case. Mr. Justice Quain observed that it was strange that under the Judicature Acts the old obsolete method of demurrer should have been returned to. It was agreed to strike out the demurrer and send the case to trial."

A defence of the Statute of Limitations cannot be raised by demurrer to the statement of claim.† By Order XIX., Rule 18, it is expressly provided that the defence of the Statute of Limitations must be specially pleaded.

In the case of *Cox v. Barker, Barker v. Cox*,‡ the facts of which are fully set out in the note to Rule 2 of Order XVI., *supra*, the plaintiff, in her statement of claim, sought to obtain from the Court an abstract expression of opinion on several matters, in some only of which the defendant was interested. The defendant demurred on the ground that the facts alleged did not show any cause of action against him to which the Court could give effect. Vice-Chancellor Bacon, relying on Order XVI., Rule 2, overruled the demurrer; and the Court of Appeal upheld his decision.

An action was brought under s. 121 of the 16 and 17 Vict., c. 97, on an order made by justices, under s. 96 of that statute, directing the guardians of a union to pay £101 for the maintenance of a pauper lunatic in an asylum. The guardians defended the action. The Queen's Bench Division refused an application under Order XXVII., Rule 1, to strike out the statement of defence as frivolous, the guardians being entitled to plead to the action, and if it was contended that the plea afforded no answer to the statement of claim, the proper mode of raising that question was by demurrer.§

In an action against the owner of a tug by a shipowner for "improper

* Of Thursday, May 25th, 1876.

† *Wakelee v. Davis*, 25 W. R., 60.

‡ 3 Ch. D., 359; 35 L. T., 685.

§ *Finch v. The Guardians of the York Union*, 35 L. T., 360.

navigation," the defendant pleaded that his liability was limited* to £8 per ton of the tug's tonnage. The plaintiff demurred. The Common Pleas Division held that the plea was not a mere plea to damage, but a ground of equitable defence under subsection (2) of section 24 of the Supreme Court of Judicature Act, 1873, and that such a defence was properly challenged by demurring. The Court, however, overruled the demurrer.†

Ord. XXVIII.,
Rule 1.

Rule 2.

A demurrer shall state specifically whether it is to the whole or to a part, and if so, to what part, of the pleading of the opposite party. It shall state some ground in law for the demurrer, but the party demurring shall not, on the argument of the demurrer, be limited to the ground so stated. A demurrer may be in the Form 28 in Appendix (C) hereto. If there is no ground, or only a frivolous ground of demurrer stated, the Court or Judge may set aside such demurrer with costs.

In the form of demurrer provided by s. 89 of the Common Law Procedure Act, 1852, the ground of law was to be stated in the margin, the demurrer simply alleging that the pleading demurred to was "bad in substance." A reference to Form (28) in Appendix (C) will show that the old form has, in this respect, been departed from. The defendant, as in Equity,‡ states expressly that he "*demurs*" to the previous pleading or to some specific part of it; and then goes on to say "that the same is bad in law on the ground (here state a ground of demurrer) and on other ground sufficient in law to sustain this demurrer." The ground will thus be stated in the body of the demurrer, instead of in the margin as hitherto. A demurrer without a marginal note or with only a frivolous ground stated might, under the former practice, have been set aside on summons.§ The form of the marginal note was—"one of the matters of law intended to be argued is, that," &c. The new form, as we have seen, says that there are "*other grounds*." In Equity it was necessary to state one or more "causes of demurrer."||

"A frivolous ground of demurrer." In an action for breach of an agreement to pay deposit money, the statement of claim, instead of asking for damages, asked for the deposit money as a debt. Archibald, J., at chambers, decided that a demurrer to the statement of claim could not be struck out as frivolous, but he gave plaintiff leave to amend the statement of claim.¶

* By s. 54 of the Merchant Shipping Act, 1862.

† *Wahlberg v. Young*, 24 W. R., 847; 2 Charley's Cases (Court), 54.

‡ See the forms in Daniel's Chancery Forms, chaps. 14 and 18.

§ *Lucy v. Umbers*, 3 Dowl., 732. See a form of such a summons in Chitty's Forms, pp. 474, 475.

|| Daniel's Chancery Practice, 503.

¶ *Wilks v. Parker*, 2 Charley's Cases (Chambers), 45.

Ord. XXVIII., "Or a Judge." The application is generally by summons at chambers.
Rule 2. A Master can hear it.*

Rule 3.

A demurrer shall be delivered in the same manner and within the same time as any other pleading in the action.

A demurrer must be delivered (the idea of filing under Rule 18 of the Principal Act, see note to Rule 1, has been abandoned) within eight days if it is a demurrer to a statement of claim; within three weeks if it is a demurrer to a statement of defence.

In *Hodges v. Hodges*,† the defendant obtained an order, enlarging the time for him to "deliver his defence." Jessel, M.R., decided that the word "defence" included a demurrer.

Rule 4.

A defendant desiring to demur to part of a statement of claim, and to put in a defence to the other part, shall combine such demurrer and defence in one pleading. And so in every case where a party entitled to put in a further pleading desires to demur to part of the last pleading of the opposite party he shall combine such demurrer and other pleading.

This Rule is taken from the practice of the Court of Chancery. See Chapter XXIII. of the Vol. of "Forms" accompanying Daniel's Chancery Practice. The joint demurrer and plea in Chancery is headed, "The demurrer and plea of A.B., the above-named defendant, to the Bill of Complaint of the above-named plaintiff." The form then continues:—"I, the defendant A.B., do demur, &c., and for cause of demurrer do shew that," &c.; "and I, the defendant A.B., do plead, and for plea say that," &c.

If a defendant demurs to part of a statement of claim and puts in a defence to the other part, he must be taken, upon the argument of the demurrer, only to admit the allegations of fact contained in the part to which he demurs.‡

Rule 5.

If the party demurring desires to be at liberty to plead as well as demur to the matter demurred to, he may,

* Coe's Practice of the Judges' Chambers, 87.

† 2 Ch. D., 112; 24 W. R., 293.

‡ *Watson v. Watkins*, 24 W. R., 884.

before demurring, apply to the Court or a Judge for an order giving him leave to do so ; and the Court or Judge, if satisfied that there is reasonable ground for the demurrer, may make an order accordingly, or may reserve leave to him to plead after the demurrer is overruled, or may make such other order and upon such terms as may be just.

Ord. XXVIII.,
Rule 5.

This Rule is founded on section 80 of the Common Law Procedure Act, 1852.

“Apply to a Judge.” By summons at chambers. A Master can hear it.*

“If satisfied.” The enactment just cited requires that the party or his attorney (if required) should make an affidavit that he believes in the truth of his plea and goodness of his demurrer.

“Reasonable ground for the demurrer.” Leave was given by Lindley, J., at chambers, to a defendant to plead and demur, the ground of demurrer being that “the statement of claim disclosed no cause of action.”†

Rule 6.

When a demurrer either to the whole or part of a pleading is delivered, either party may enter the demurrer for argument immediately, and the party so entering such demurrer shall on the same day give notice thereof to the other party. If the demurrer shall not be entered, and notice thereof given within ten days after delivery, and if the party whose pleading is demurred to does not within such time serve an order for leave to amend,‡ the demurrer shall be held sufficient for the same purposes and with the same result as to costs as if it had been allowed on argument.

The Rule is taken from Order XIV., Rules 11, 14 and 15 of the Consolidated Orders of the Court of Chancery, “ten days after delivery” being, however, substituted for “twelve days after filing.”

By the Reg. Gen., Hil. T., 1853, Rule 16, the plaintiff is to deliver copies of the demurrer-book with the points intended to be insisted upon, to the Chief and Senior Puisne Judge of the Court, “four clear days before the day appointed for argument;” and the defendant is to deliver copies to the two other Judges next in seniority.

* Coe's Practice of the Judges' Chambers, 82, 83.

† 2 Charley's Cases (Chambers), 46.

‡ See Order XXVII., Rules 1 and 6.

**Ord. XXVIII,
Rule 7.**

Rule 7.

While a demurrer to the whole or any part of a pleading is pending, such pleading shall not be amended, unless by order of the Court or a Judge; and no such order shall be made except on payment of the costs of the demurrer.

Prior to this enactment an amendment of the pleading demurred to was, at Common Law, generally allowed, *as of course*, on payment of costs. In some cases it might be allowed even without costs, or on payment of nominal costs.*

This Rule operates as a restriction on the power of amending pleadings, under Order XXVII., Rules 2 and 3, without leave.

Rule 8.

Where a demurrer to the whole or part of any pleading is allowed upon argument, the party whose pleading is demurred to shall, unless the Court otherwise order, pay to the demurring party the costs of the demurrer.

By the 3 and 4 Wm. IV., c. 42, s. 34, "When judgment shall be given either for or against a plaintiff or a defendant upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf."†

Under that Statute the party obtaining judgment at Common Law is entitled to the costs of the demurrer, whatever may be the results of the cause.‡

These words shew that there are cases in which the Court *ought* to "otherwise order." Per Jessel, M.R., in *Duckett v. Gover*.§

"Unless the Court otherwise order." This Rule is copied from Order XIV., Rule 13, of the Consolidated Orders of the Court of Chancery (cited under Rule 9, *infra*), in which the words, "unless the Court shall otherwise direct," occur.

"Is allowed upon argument." Or upon non-appearance, when the demurrer is called on for argument, of the Counsel of the party whose pleading is demurred to.||

Rule 9.

If a demurrer to the whole of a statement of claim

* *Tomlinson v. Ballard*, 4 Q.B., 642. 2 Archbold's Practice, p. 927.

† See also the older Stat. 8 and 9 Wm. III., c. 11, s. 2.

‡ *Bentley v. Dawes*, 10 Ex., 347; *Burdon v. Flour*, 7 D. P. and C., 786.

§ 46 L. J. (Ch.), 407; 25 W. R., 445; W. N., 1877, p. 62.

|| *Turner v. Samson*, W. N., 1876, p. 163; 11 N. C., 105. Compare Order XXXVI., Rules 18 and 19, as to non-appearance of a party at the trial.

be allowed, the plaintiff, subject to the power of the Court Ord. XXVIII,
Rule 8 to allow the statement of claim to be amended, shall pay to the demurring defendant the costs of the action, unless the Court shall otherwise order.

This Rule is in accordance with the Chancery Practice. "Where a demurrer to the whole or part of a Bill is allowed upon argument the plaintiff, unless the Court shall otherwise direct, shall pay to the demurring party the costs of the demurrer, and, when the demurrer is to the whole Bill, the cost of the suit also." * Compare Reg. Gen., Hil. T., 1853, Rule 62.

"Is allowed." See *Turner v. Samson*,† cited under Rule 8.

Rule 10.

Where a demurrer to any pleading or part of a pleading is allowed in any case not falling within the last preceding Rule, then (subject to the power of the Court to allow an amendment) the matter demurred to shall as between the parties to the demurrer be deemed to be struck out of the pleadings, and the rights of the parties shall be the same as if it had not been pleaded.

"In any case not falling within the preceding Rule," i.e., in any case where the demurrer is *not to the whole* of the statement of claim.

The Rule embodies substantially the practice as to "partial demurrers" of the Court of Chancery.‡

Rule 11.

Where a demurrer is overruled the demurring party shall pay to the opposite party the costs occasioned by the demurrer, unless the Court shall otherwise direct.

See Rule 8 of this Order, and the Statutes there cited.

This Rule appears to impose some restrictions on the right of the party at Common Law, whose pleading is demurred to, to recover the costs of the demurrer, by the insertion of the words, "unless the Court shall otherwise direct."

The Rule is founded on Order XIV., Rule 12, of the Consolidated Orders of the Court of Chancery:—"When any demurrer is overruled, the defendant shall pay to the plaintiff the taxed costs occasioned thereby, unless the Court shall otherwise direct."

* Order XIV., Rule 13, of the Consolidated Orders of the Court of Chancery.

† W. N., 1876, p. 163; 11 N. C., 105.

‡ See Daniel's Chancery Practice, pp. 513, 514.

**Order XXVII.,
Rule 6.**

In the case of *King v. Clarke*,* the plaintiff filed a Bill upon a voluntary settlement, praying that the trustees might be restrained from selling part of the property, and that the trusts might be carried out under the direction of the Court. After answer put in by the defendants, the plaintiff amended his Bill, alleging mismanagement by the trustees, and praying for an account against them, on the footing of negligence or default, but not alleging any specific act of neglect or default. On a replication filed, and the plaintiff then applied under the present Rule, to amend the Bill, by alleging any specific act. Vice-Chancellor Bacon gave leave, on the terms that the plaintiff should not go into further evidence, and should pay the costs of the present hearing; the defendant to be at liberty to bring in evidence against the specific acts to be alleged.

"Costs." In *Cargill v. Bower*,† in which leave was given to one of several defendants to put in a separate and distinct defence, without any affidavit as to the nature of it, the defendant applied by Malins, V.C., to pay such reasonable costs of the plaintiff as had been rendered necessary by his not attending to his full defence. The Court, however, allowed the plaintiff only the costs of Counsel only, either senior or junior, as the plaintiff might show that there could be no justification for retaining, as the plaintiff did, two Queen's Counsel and a junior on a merely formal application. The Lordship allowed the co-defendants only 40s. costs, as it was quite sufficient for them to have given a consent brief.

In cases in which the application is made at a late stage of proceedings, e.g., after issue has been joined, the practice is that the party applying for leave the entire cost of the application.

Rule 7.

If a party who has obtained an order for leave to amend a pleading delivered by him does not amend within the time limited for that purpose by the order, or if no time is thereby limited, then within four weeks from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, become *ipso facto* void, unless the time is extended by the Court or a Judge.

The party at Common Law who obtained an order to amend, may act upon it, or to abandon it, at his option; if he chooses to amend, he might proceed as if the order had not been made.

The present Rule will be useful in fixing the time within which the party must amend.

* 1 Ch. D., 57; 45 L. J. (Ch.), 190, 33 L. T., 373.

† 4 Ch. D., 78; 40 L. J. (Ch.), 175, 35 L. T., 353.

‡ See e.g., *The Charterfield Company v. Morgan*.

Morgan v. Green, 11 N. C., 222.

§ *Black v. Sangster*, 1 C. M. & L., 70.

A plaintiff is not "bound" to deliver a statement of claim where the defendant has stated in his Memorandum of Appearance that he does not require any. (See Order XXI., *supra*.) Order XXIX.,
Rule 1.

"Dismissing an action for want of prosecution" is better known by the familiar appellation of "judgment of *non pros*," which is defined by Mr. Archbold* to mean "a final judgment against the plaintiff for costs only, signed by the defendant, whenever the plaintiff, in any stage of the action, neglects to prosecute the suit or part of it within the time limited by the practice of the Court for that purpose."

The phrase, "dismissing a Bill for want of prosecution," is a familiar one in Equity. As to the cases in which a defendant may move the Court that a Bill be dismissed with costs for want of prosecution, see Order XXXIII. (III.) of the Consolidated Orders of the Court of Chancery.

As already stated, after judgment of *non pros* a plaintiff might commence a new action against a defendant for the same cause.† An order to dismiss a Bill for want of prosecution could be pleaded in bar to a new Bill for the same matter.‡

"Such other order as shall seem just." Vice-Chancellor Hall, in *Higginbotham v. Aynsley*,§ on motion by the defendant to dismiss the action under this Rule, for want of prosecution, allowed the plaintiff a week's extra time, after the expiration of the six weeks limited by Order XXI., Rule 1, within which to deliver his statement of claim, the plaintiff submitting to pay the costs of the motion.

On the 25th November, 1875, an application was made to Sir George Jessel, M.R., to dismiss, for want of prosecution, an action in which the answer had been filed in April, 1875. His lordship directed that the action should be continued under the new practice, and that on the plaintiff undertaking to deliver his reply *within fourteen days* no other order should then be made, except that the plaintiff was to pay the costs of the application.||

An action on a bill of exchange against the indorser was stayed by Lindley, J., at chambers, nothing having been done by the plaintiff since the defendant's appearance to the writ five months previously, and the plaintiff having been paid the amount of the bill by the acceptor. The case was heard on appeal from the Master, who had refused to dismiss the action under the present Rule for want of prosecution.¶

By Order XXXVI., Rule 4a, the defendant, instead of giving notice of trial under Rule 4 of that Order (*i.e.*, where the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as a Court or Judge may allow, give notice of trial), may apply to the Court or a Judge to dismiss the action for want of prosecution. (Rule 4a does not refer to Rule 4, but it is clearly necessary to incorporate with Rule 4a a reference to Rule 4.)

Rule 4a of Order XXXVI. was added by the Rules of the Supreme Court, June, 1876; and in the July following, Hall, V.C., in *Litton v. Litton*,** said that the defendant might move under this new Rule, "if the plaintiff did not within the six weeks give notice of trial."

* Archbold's Practice, p. 1479.

† Archbold's Practice, p. 1482.

‡ Daniel's Chancery Practice, p. 714.

§ 1 Ch. D., 288; 24 W. R., 782.

|| *Sutton v. Huggins*, W. N., 1875, p. 235; 1 Charley's Cases (Court), 106.

¶ 2 Charley's Cases (Chambers), 46.

** 3 Ch. D., 793; 24 W. R., 962.

Order XXIX., Where, after action brought, the plaintiff has become bankrupt, notice
Rule 1. of motion to dismiss the action for want of prosecution should be given to his trustee.*

Rule 2.

If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose,† deliver a defence or demurrer, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed, with costs.

The analogous proceeding in the case of default of appearance will be found in Order XIII., Rule 5, *supra*. See Order XIV., *supra*, as to writs specially indorsed.

This Rule would apply, on default of pleading, after leave to defend.

By section 93 of the Common Law Procedure Act, "in actions where the plaintiff seeks to recover a debt or liquidated demand in money, judgment by default shall be final."

It is apprehended that a defendant is not *bound*, under Order XXII., Rule 3, *supra*, to deliver a statement of defence, where he has waived his right to a statement of claim.

See the case of *Jenkins v. Davies*,‡ cited under the next Rule.

The present Rule has no application to Admiralty actions *in rem*. The old practice as to default is still in force with regard to these actions.§

Rule 3.

When in any such action as in the last preceding Rule mentioned there are several defendants, if one of them make default as mentioned in the last preceding Rule, the plaintiff may enter final judgment against the defendant so making default, and issue execution upon such judgment without prejudice to his right to proceed with his action against the other defendants.

See Order XIII., Rule 4, and the note to that Rule, *supra*, where a similar principle is applied. The principle is extended here to a debt or liquidated demand, when the writ is *not specially endorsed*.

In *Jenkins v. Davies*,|| an action was brought against two defendants on their joint and several promissory note. The two defendants were husband and wife, and they delivered a statement of defence, which pur-

* *Wright v. The Swindon, Marlborough, &c., Railway Company*, 4 Ch. D., 164; 46 L. J. (Ch.), 199.

† See Order XXII., Rule 1, and Order XXVIII., Rule 3, *supra*.

‡ 1 Ch. D., 696; 24 W. R., 690.

§ *The Sfactoria*, 2 P. D., 3; 35 L. T., 431; 25 W. R., 62.

|| 1 Ch. D., 696; 24 W. R., 690.

ported to be their joint defence, but which was, in reality, the defence of the wife alone. Hall, V.C., after having had his attention called to Order XIX., Rule 17, under which allegations not specifically denied must be taken to have been admitted, gave leave to the plaintiff to enter final judgment under this Rule against the husband.

Order XXIX.,
Rule 3.

Rule 4.

If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant makes default as mentioned in Rule 2, the plaintiff may enter an interlocutory judgment against the defendant, and a writ of inquiry shall issue to assess the value of the goods, and the damages, or the damages only, as the case may be. But the Court or a Judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way in which any question arising in an action may be tried.

Where the action proceeds in a District Registry, and the plaintiff is entitled to enter interlocutory judgment under this Rule, such interlocutory judgment, and, where damages have been assessed, final judgment is to be entered in the District Registry, unless the Court or a Judge shall otherwise order. Order XXXV., Rule 1a, *infra*.

The proceeding in this case is identical with that prescribed by Order XIII., Rule 6, in default of appearance. See the note to that Rule, *supra*.

The Court or a Judge will probably in all cases when the damages are "substantially" matter of calculation refer the ascertaining of the *quantum* to a Master or Referee or District Registrar.

As to the concluding words of this Rule, see *Ivory v. Cruikshank*,* cited under Order XIII., Rule 6, *supra*.

Rule 5.

When in any such action as in Rule 4 mentioned there are several defendants, if one of them make default as mentioned in Rule 2, the plaintiff may enter an interlocutory judgment against the defendant so making default, and proceed with his action against the others. And in such case, damages against the defendant making default shall be assessed at the same time with the trial of the action or issues therein against the other defendants, unless the Court or a Judge shall otherwise direct.

* 1 Charley's Cases (Court), 123.

Order XXIX., The principle applied in Order XIII., Rule 4, *supra*, is here still f
Rule 5. extended to actions for *unliquidated* damages. The practice has been
 when judgment by default has been signed as to part, and issue joined
 to the residue, the jury who tried the issue assessed the damages as
 whole. So if there be demurrer to one count and issue is joined as
 residue, the jury who try the issue in fact will assess damages on
 demurrer.*

Rule 6.

If the plaintiff's claim be for a debt or liquidated demand, and also for detention of goods and pecuniary damages, or pecuniary damages only, and the defendant makes default as mentioned in Rule 2, the plaintiff may enter final judgment for the debt or liquidated demand and also enter interlocutory judgment for the value of goods and the damages, or the damages only, as the case may be, and proceed as mentioned in Rule 4.

A joinder of liquidated and unliquidated demands in the same action is here contemplated. Each is to be dealt with separately, as if there were two distinct actions. In the case of the claim for unliquidated damages a writ of inquiry or reference is necessary.

Rule 7.

In an action for the recovery of land, if the defendant makes default as mentioned in Rule 2, the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land, with his costs.

See as to this action Order XIX., Rule 15, *supra*, which introduces a new practice by sanctioning statements of defence in this form of action. Under section 178 of the Common Law Procedure Act, 1852, there can be no "default in pleading" in the case of ejectment.

Rule 8.

Where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract upon a writ for the recovery of land, if the defendant makes default as mentioned in Rule 2, or, if there be no

* See *Codrington v. Lloyd*, 1 P. and D., 157; 2 Archbold's Practice, p. 990.

than one defendant, some or one of the defendants make such default, the plaintiff may enter judgment against the defaulting defendant or defendants, and proceed as mentioned in Rules 4 and 5. Order XXIX,
Rule 6.

Order XVII., Rule 2, *supra*, sanctions joining in one action claims for mesne profits, arrears of rent, and damages for breach of contract in relation to the same premises, with ejectment.

Similar provisions to those contained in this Rule are contained in Order XIII., Rule 8, *supra*, in the case of default of appearance.

The principle of Order XIII., Rule 4, *supra*, is applied in this Rule.

As the claims indorsed on the writ are for unliquidated damages, an inquiry into their *quantum* is necessary. (See the note to Rule 5 of this Order, *supra*.)

Rule 9.

In Probate actions, if any defendant make default in filing and delivering a defence or demurrer, the action may proceed, notwithstanding such default.

See Order XIII., Rule 9, *supra*, in which the same principle is applied.

Rule 10.

In all other actions than those in the preceding Rules of this Order mentioned, if the defendant makes default in delivering a defence or demurrer, the plaintiff may set down the action on motion for judgment,* and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff to be entitled to.

As to "motion for judgment," see Order XL., *infra*.

"In all *other* actions." This Rule applies chiefly to actions assigned, under s. 34 of the Principal Act, to the Chancery Division of the High Court.

All parties desiring that an administration suit, pending on the 1st of November, 1875, in which an answer had been put in, but no further steps had been taken, should be heard short, the Court directed that the plaintiff should be at liberty to set down the cause under the present Rule on motion for judgment, as though the defendant had made default in delivering a statement of defence.†

The present Rule does not apply to a case of default in putting in an answer to interrogatories, in an action commenced before the 1st of November, 1875. The plaintiff must proceed under the old practice, abandoning an answer, and taking the bill *pro confesso*.‡

* But the plaintiff must previously deliver a statement of claim. *Menton v. Metcalf*, 36 L. T., 683 (V. C. H.).

† *Palin v. Brooks*, 33 L. T., 332; 24 W. R., 20; 1 Charley's Cases (Court), 107.

‡ *Culley v. Buttifant*, 1 Ch. D., 84; 45 L. J. (Ch.), 200; 24 W. R., 55; 1 Charley's Cases (Court), 108.

**Order XXIX.,
Rule 10.**

The practice adopted in *Culley v. Buttifant* does not apply where, in an action commenced before the 1st of November, 1875, the defendant made default in appearance as well as in answering. The bill is then to be treated as a statement of claim, and the plaintiff should file an affidavit of service under Order XIII., Rule 9, and proceed under the present Rule, as if the defendant had appeared and made default in delivering a statement of defence.*

In January, 1876, Vice-Chancellor Hall decided that, where the defendant has made default in delivering a defence, and the plaintiff has set down the action on motion for judgment under the present Rule, a motion for judgment may, if all parties consent, be *taken at once as an ordinary motion instead of awaiting its turn in the general paper*, just as, under the old practice, a motion for decree could, by consent, have been taken as an ordinary motion.†

On February 3rd, 1876, Vice-Chancellor Hall decided that, where the defendant has made default in delivering a defence, and the plaintiff has set down the action on motion for judgment under the present Rule, two clear days' notice of the motion for judgment must be given to the defaulting defendant.‡ This decision was based on Order LI., Rule 4.§

On the 17th of February, 1876, Sir George Jessel, M.R., decided that, where the defendant has made default in delivering a defence, and the plaintiff has set down the action on motion for judgment under the present Rule, the case should, "as a general rule," go into the general paper, and be tried in its turn, otherwise the plaintiff would gain an advantage over the other suitors. In the case in which this was decided the plaintiff had given notice of motion for judgment twice over (at first under a mistake). In view of this his lordship did not apply this "general rule" to the case before him, but gave immediate judgment for the plaintiff on an ordinary motion-day, because the defaulting defendant had, in his lordship's opinion, had "ample notice."||

On the 9th of March, 1876, Sir George Jessel, M.R., decided that, where the defendant has made default in delivering a statement of claim, the plaintiff cannot move for judgment under Order XI., Rule 11, on an implied admission of the facts in the statement of claim, and Rule 12, *infra*, but that he may set the action down on motion for judgment under the present Rule, without previous notice of its having been so set down. The cause would then come on for trial in its regular turn, and notice of motion be given in due course.¶

There would seem to be some vague notion that Jessel, M.R., in *Gill v. Ker*, decided that no notice of motion for judgment under the present Rule is necessary, and that this decision conflicts with the decision of Hall, V.C., in *Roupell v. Parsons*, that two days' notice of motion for judgment under this Rule is necessary. But a careful perusal of the

* *The Provident Permanent Building Society v. Greenhill*, 1 Ch. D., 61, 45 L. J. (Ch.), 272.

† *Bowen v. Bowen*, 24 W. R., 246; W. N., 1876, p. 31.

‡ *Roupell v. Parsons*, 24 W. R., 269; 34 L. T., 56.

§ "Unless the Court or a Judge give special leave to the contrary, there must be at least two clear days between the service of a notice of motion and the day named for hearing the motion."

|| *Hate v. Snelling*, W. N., 1876, p. 77; N. C., same day.

¶ *Gillott v. Ker*, 24 W. R., 428; 11 N. C., 78; W. N., 1876, p. 1.

judgment of the Master of the Rolls will shew that there is no conflict between the two decisions. What the Master of the Rolls decided in *Gillott v. Ker* was that no notice to the defendant was necessary of the *setting down* of the action on motion for judgment under the present Rule. His lordship distinctly stated that notice of the motion for judgment must be given "in due course." What "due course" is appears from the decision of Hall, V.C., in *Roupell v. Parsons*. The Master of the Rolls has repeatedly stated that an affidavit of service of the notice of motion for judgment is requisite to enable the plaintiff to move for judgment under this Rule. In *Martin v. Parker*,* for example, Jessel, M.R., decided that, where the defendant has made default in delivering his defence, and the plaintiff has set down the action or motion for judgment under the present Rule, the plaintiff will be entitled to move for judgment *on affidavit of the service of the notice of motion*, without further evidence. An affidavit that the defendant has made default in delivering his defence is not necessary.

Order XXIX.,
Rule 10.

On the 10th of March, 1876, Vice-Chancellor Malins decided that, where the defendant has made default in delivering a statement of defence, and the plaintiff moves for judgment on an ordinary motion-day, the plaintiff is entitled to have judgment at once.† This decision was evidently contrary to the "general rule" laid down by Jessel, M.R., in *Hate v. Snelling*, that the case should go into the general paper and be tried in its turn.

To clear up the questions of practice raised with regard to the present Rule, the following notice was issued by the Senior Chancery Registrar in December, 1876:—"The Master of the Rolls and the Vice-Chancellors have given directions that motions for judgment in actions *shall not be brought on as ordinary motions*, but shall be set down in the Cause Book. They can be marked short, on production of the usual certificate of Counsel, and will then be placed in the paper on the first short-cause day after the day for which notice is given. If not marked short, *they will come into the general paper in their regular turn*. It will be advisable that the notices of motion for judgment should, if it is intended to mark them short, contain a statement to that effect, and also a statement that *no further notice* will be given of their having been so marked. Such statement will dispense with the necessity for giving defendants further notice that motions for judgment have been marked short."‡

Hall, V.C., on March 15th, 1877, directed the case of *Parsons v. Harris* § to be set down on motion for judgment under these directions.

Where the statement of defence has been struck out under Order XXXI., Rule 20, for default in filing an affidavit of documents, the plaintiff is entitled to set down the action under the present Rule on motion for judgment, just as if the defendant had made default in delivering a defence.||

As to setting down an action commenced in a District Registry on motion for judgment in London under the present Rule, see *Walker v. Robinson*,¶ and *The Birmingham Waste Company v. Lane*.**

As to delivering notice of judgment under this Rule, see the note to Order XIX., Rule 6, *supra*.

* 12 N. C., 87. See also *Hate v. Snelling*, *ubi supra*.

† *Pearce v. Spickett*, W. N., 1876, p. 109.

‡ W. N., 1876 (Notices), p. 233; see the Notice, *infra*.

§ W. N., 1877, p. 76; 25 W. R., 410.

|| *Fisher v. Hughes*, 25 W. R., 208.

¶ 24 W. R., 137. (V. C. B.)

** 24 W. R., 292. (V. C. H.)

Order XXIX.,
Rule 11.

Rule 11.

Where, in any such action as mentioned in the last preceding Rule, there are several defendants, then, if one of such defendants make such default as aforesaid, the plaintiff may either set down the action at once on motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants.

See Order XIII., Rule 4, *supra*, as to default by one of several defendants, and Rules 3, 5 and 8 of this Order, *supra*. As to "motion for judgment," see Order XL., *infra*.

In *Re Smith, Bridson v. Smith*, Hall, V.C., adopted the latter of the two alternatives mentioned in the present Rule, and directed that the action should be set down on motion for judgment on the same day against two defaulting defendants, and against a defendant who had put in a defence.*

The principle of this decision was followed by the same learned Judge in the case of *Parsons v. Harris*.†

Rule 12.

If the plaintiff does not deliver a reply or demurrer, or any party does not deliver any subsequent pleading, or a demurrer, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and the statements of fact in the pleading last delivered shall be deemed to be admitted.‡

This Rule, as regards admissions, should be read in connection with Order XIX., Rule 17, *supra*; as regards closing the pleadings, with Order XXV., *supra*.

This Rule does not apply, so as to enable a defendant who has delivered a counterclaim, to which the plaintiff has not put in any reply, to obtain judgment in accordance with his counterclaim, under Order XL., Rule 11, as upon admissions of fact in the counterclaim ("the pleading last delivered"); as no order can be made upon a counterclaim before the claim of the plaintiff has been dealt with.§

* 24 W. R., 392; W. N., 1876, p. 103.

† W. N., 1877, p. 76; 25 W. R., 410.

‡ See, as to this Rule, *Earp v. Henderson*, 3 Ch. D., 254; 34 L. T., 844; *Hall v. Eve*, 4 Ch. D., 254; 46 L. J. (Ch.), 145; 35 L. T. 735; 25 W. R., 177.

§ *Aitken v. Dunbar*, 46 L. J. (Ch.), 489; and see *Rolfe v. MacLaren*, 3 Ch. D., 106; 24 W. R., 816.

Rule 13.

Order XXIX.,
Rule 13.

In any case in which issues arise in an action other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the opposite party may apply to the Court or a Judge for such judgment, if any, as upon the pleadings he may appear to be entitled to. And the Court may order judgment to be entered accordingly, or may make such other order as may be necessary to do complete justice between the parties.

This Rule applies to the case of third parties, the recommendation of the Judicature Commission *:—"We think that either"—(? any)—"party should be at liberty to apply at any time, either before or after pleading, *for such order as he may, upon the admitted facts, be entitled to.*"

Compare Order XL., Rule 11, *infra*.

Rule 14.

Any judgment by default, whether under this Order or under any other of these Rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit.

A regular judgment by default might have been set aside at Common Law upon an affidavit of merits, stating that "the defendant has a good defence to this action upon the merits."† It was usually set aside upon such terms as placed the plaintiff as nearly as possible in the same situation as if the action had proceeded in its regular course.‡ In ordinary cases it was almost a matter of course to grant the application for setting aside a judgment by default.§ It was, however, wholly discretionary with the Court to grant or not to grant it.

As to setting aside judgment for default of entering an appearance, see Order XIII., Rule 3, *supra*. As to setting aside judgment for default of appearing at the trial, see Order XXXVI., Rule 20, *infra*.

ORDER XXX.

PAYMENT INTO COURT IN SATISFACTION.

Rule 1.

Where any action is brought to recover a debt or damages, any defendant may at any time after service of

* First Report, p. 12.

† *Lane v. Isaacs*, 3 Dowl., 652.

‡ See *Anon*, 3 Doug., 431; *Smith v. Blundell*, 1 Chit. Rep., 226.

§ *Wood v. Cleveland*, 2 Salk., 518.

Rule 2

Order XXX.,
Rule 2.

Such sum of money shall be paid to the proper officer, who shall give a receipt for the same. If such payment be made before delivering his defence, the defendant shall thereupon serve upon the plaintiff a notice that he has paid in such money, and in respect of what claim, in the Form No. 5 in the Appendix (B) hereto.

See the Order of November 12, 1875, cited under Rule 1, *supra*.

The first clause of this Rule is taken from the first part of s. 72 of the Common Law Procedure Act, 1852.

The present order introduces an entirely new practice of noticing the plaintiff of payment into Court *before the delivery of the defence*. The *modus operandi* under the former practice in the Queen's Bench is thus described by Mr. Archbold:—"Prepare a plea of payment into Court. Take the plea to the Master's office. The officer there will give you an authority to Messieurs Hoare, bankers, in Fleet Street, to receive the money. The clerk at Messieurs Hoare's will give you a printed receipt. Take such receipt and the plea to the Master's office and the clerk there will sign a receipt in the margin of the plea for the money paid into Court. Pay such clerk the proper fee* upon payment of money into Court. Deliver the plea to the plaintiff's attorney or agent, as in ordinary cases."† The same (or a similar) method of proceeding will, of course, still be necessary, where the payment into Court is made "at the time of delivering the defence" (Rule 1).‡

No form, it will be seen, is given of a plea of payment into Court. The notice, however, closely follows the form of plea given in s. 71 of the Common Law Procedure Act, 1852, and it is apprehended that that form, *mutatis mutandis*, will be still sufficient.

Rule 3.

Money paid into Court as aforesaid shall be paid out to the plaintiff, or to his solicitor on the written authority of the plaintiff. No affidavit shall be necessary to verify the plaintiff's signature to such written authority, unless specially required by the officer of the Court.

* See 7 Wm. IV. & 1 Vict. c. 30, s. 9. † Archbold's Practice, p. 1364.

‡ The system pursued in the office of the Masters of the Court of Common Pleas differs from that adopted in the office of the Masters of the Queen's Bench. The solicitor takes the plea of payment into Court and the money to the Chief Clerk of the Masters, who pays the money into Child's Bank. When the money so lodged at that bank reaches a certain amount, the Chief Clerk draws a cheque upon the bank for it and lodges it in the Bank of England. When the plaintiff comes to take the money out of Court, the Chief Clerk pays him by a cheque upon the Bank of England, where there is always a balance of at least £10,000 standing to the Chief Clerk's credit.

**Order XXX.,
Rule 3.**

The first clause of this Rule is taken from the latter part of section 72 of the Common Law Procedure Act, 1852, the words "unless otherwise ordered by a Judge" being added. The second clause of the Rule is taken from Reg. Gen. Hil. T., 1853, Rule II., the words "officer of the Court" being substituted for "Master."

Rule 4.

The plaintiff, if payment into Court is made before delivering a defence, may within four days after receipt of notice of such payment, or, if such payment is first stated in a defence delivered, then may before reply, accept the same in satisfaction of the causes of action in respect of which it is paid in; in which case he shall give notice to the defendant in the Form No. 6 in Appendix (B) hereto, and shall be at liberty, in case the sum paid in is accepted in satisfaction of the entire cause of action, to tax his costs, and in case of non-payment within forty-eight hours, to sign judgment for his costs so taxed.

The Rule is taken from section 73 of the Common Law Procedure Act, 1852, except as to the form of notice.

The 73rd section, however, only contemplated an acceptance of the sum paid into Court "after the delivery of a plea of payment of money into Court, but before reply; the present Rule contemplates such an acceptance either *before* a defence is delivered, or after it.

"May before reply."* See notes to Rules 1 and 2 of this Order.

It will be seen that the payment may still be accepted in satisfaction of *part* of the plaintiff's claim, as well as of *the whole*.

The notice to the defendant is new.

The present Rule is governed by Order LV., which gives the Judge the power of depriving the plaintiff of costs. A plaintiff was deprived of the costs because he refused to accept a lesser sum than that which he claimed, and issued a writ for the larger sum, and then took the lesser sum out of Court in full satisfaction.†

A plaintiff who accepts money paid into Court in satisfaction of his claim must be very careful to comply with the provision of this Rule, which requires him to "give notice to the defendant in the Form No. 6 in Appendix (B)" as, if he neglects to do so, he may, on taxation of costs, instead of being allowed his costs, be obliged to pay the costs of the defendant.‡

* Query. What if the payment is made *after the reply*?

† *Broadhurst v. Willey*, 2 Charley's Cases (Chambers), 47. See Lindley, J.

‡ *Langridge v. Campbell*, 46 L. J. (Ch.), 377; 36 L. T., 64; 25 W. R., 351. The circumstances of that case were, no doubt, peculiar.

ORDER XXXI.

Order XXXI.,
Rule 1.

DISCOVERY AND INSPECTION.

Rule 1.

The plaintiff may, at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings, and a defendant may, at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may at any time, by leave of the Court or a Judge, deliver interrogatories in writing for the examination of the opposite party or parties, or any one or more of such parties, with a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose.

This Rule is a more elaborate statement of the principle laid down in the first part of Rule 25 of the Principal Act, *supra*. Compare s. 51 of the Common Law Procedure Act, 1854.

Mr. Day recommended * that, when the Judge had decided that some interrogatories should be put, it should be left to the party interrogating to put, at his own cost, such questions as he might be advised, instead of taking up the valuable time of a Judge at chambers in ascertaining amid the hurry and confusion, first, not merely whether *any* interrogatories at all ought to be delivered, but also whether *the particular* interrogatories were themselves severally proper; a practice which also involved "parading before one's opponent the hoped-for results of questions." He considered that this would be "more convenient, and useful, and practical, and more congruous with that *in consimili casu* in Chancery."

The Legislature has, *pro tanto*, improved upon Mr. Day's suggestion by *doing away altogether* with the necessity for a Judge's order, when the interrogatories are delivered with the statement of claim, or of defence, or not later than the close of the pleadings. The intervention of the Court or of a Judge need not in future be invoked except when it is sought to administer interrogatories before or after the above-mentioned limits of time. By the provision that only one set of interrogatories can be delivered to the same party without an order, and also by the next Rule and Rule 5, *infra*, a check is put upon any abuse of the privilege accorded by the present Rule.

The check imposed by Rule 5 is very great. That Rule gives the Judge at chambers the "widest discretion" † as to striking out interro-

* Common Law Procedure Acts, pp. 308, 309.

† Per James, L.J., in *Mercier v. Cotton*, 1 Q. B. Div., 442; 46 L. J. (Q. B.), 184; 35 L. T., 79; 4 W. R., 566. *The "Biola,"* 34 L. T., 185; 24 W. R., 663.

Order XXXI., gatories; and this power has been used by some Judges to such an extent
Rule 1. as almost to render the permission accorded to the plaintiff and defendant by the present Rule to deliver interrogatories, without leave, nugatory.

And, first, with regard to the right of the plaintiff to administer interrogatories, without leave, to the defendant:—

By the express terms of the present Rule, “the plaintiff may, *at the time of delivering* his statement of claim, . . . without any order for that purpose, . . . deliver interrogatories in writing to the opposite party.”

It has, however, been laid down as a general rule, that before interrogatories can be administered by a plaintiff to a defendant, a statement of claim must be delivered.*

Lindley, J., in *Strong v. Tappin*,† at chambers, said:—“The practice of delivering interrogatories *with* the statement of claim is a bad one, borrowed from the Chancery practice of filing interrogatories on the Bill, without knowing or caring what the answer will be.”

The principle upon which this decision went was that the plaintiff should not deliver interrogatories to the defendant till *after the statement of defence*, as it is impossible to know till then whether the interrogatories will be necessary or not.‡

In five reported cases subsequent to *Strong v. Tappin*, Archibald, J., at chambers, ordered interrogatories delivered *with* the statement of claim to be struck out, as premature.§

It is evident that in all these last-mentioned cases the general rule which had been previously laid down by Archibald, J., at chambers, was carried one step farther. Before a plaintiff is entitled to deliver interrogatories, it was held that a statement, not merely of claim, but of *defence*, must have been delivered.

In the leading case of *Mercier v. Cotton*, Pollock, B., ordered interrogatories administered by the plaintiff to the defendant immediately after the statement of claim to be struck out, without even looking at them. Mr. Justice Archibald and the Lord Chief Justice of England, sitting as a Divisional Court of the Queen's Bench, to which the plaintiff appealed, differed in opinion as to the propriety of the summary course adopted by Mr. Baron Pollock, the Lord Chief Justice being of opinion that under the present Rule the plaintiff was, as of right, entitled, without leave, to deliver the interrogatories before the delivery by the defendant of his statement of defence, and Mr. Justice Archibald being of opinion that Mr. Baron Pollock was right. The Court of Appeal affirmed the decision of Mr. Baron Pollock. Admitting that the plaintiff was, as of right, entitled, without leave, to deliver the interrogatories before the delivery by the defendant of the statement of defence, the Court of Appeal was of opinion that, if the Judge at chambers considered “that the matter enquired into” was “*not sufficiently material at that stage of the action*,”

* Per Archibald, J., at chambers, 2 Charley's Cases (Chambers), 49, 50.

† 2 Charley's Cases (Chambers), 51.

‡ See per Lush, J., at chambers, 1 Charley's Cases (Chambers), 105.

§ *Fenwick v. Johnson*, 2 Charley's Cases (Chambers), 51; *Drake v. Whiteley*, *ib.*; *Cotching v. Hancock*, *ib.*; *The Mercantile Mutual Insurance Company v. Shoemith*, *ib.*, 53; *Plum v. The Normanton Iron and Steam Company, Limited*, *ib.*

|| 1 Q. B. Div., 442; 46 L. J. (Q. B.), 184; 35 L. T., 79; 24 W. R., 506.

within the meaning of Rule 5 of this Order, he had the fullest discretion, under that Rule, to strike the interrogatories out. **Order XXXI., Rule 1.**

Jessel, M.R., in *Disney v. Longbourne*,* carefully guarded himself against accepting the decision in *Mercier v. Cotton* as conclusive that the plaintiff cannot in any case deliver interrogatories to the defendant before the delivery of the statement of defence; on the contrary, he considered that the decision in *Mercier v. Cotton* meant that the plaintiff might in every case pursue this course, but only at his peril, subject, that is, to the exercise by the Judge at chambers of the fullest power to strike the interrogatories out.

Secondly, as to the right of the defendant to administer interrogatories, without leave, to the plaintiff:—

The present Rule says plainly that “a defendant may, at the time of delivering his defence, . . . without an order for that purpose, . . . deliver interrogatories, in writing, for the examination of the opposite party.”

The leading case on this part of the subject is *Disney v. Longbourne*.† In that case it was decided that, as a general rule, before interrogatories can be delivered by the defendant to the plaintiff, a statement of defence must be delivered.

Where, in an action for not taking fruit, and for the price of it, the statement of claim gave the number of pots of fruit sold, leave was refused to the defendant to administer interrogatories as to the weight of fruit sold before delivering the statement of defence.‡

Lush, J., however, decided, at chambers, that discovery will be allowed to a defendant in special cases before he has delivered his statement of defence.§ An illustration of this occurred subsequently in a case, at chambers, before Mr. Justice Archibald. In that case, which was an action on a bill of exchange, the defendant, who sought to ascertain by interrogatories whether the plaintiff was a mere nominee of the drawer without consideration, was allowed to administer them before delivering a statement of defence, as, if the plaintiff proved to be a holder for value without notice, no statement of defence would be put in.||

“Either party may at any time by leave of the Court or a Judge deliver interrogatories.” A summons is in this case necessary.¶ Leave may be given under this provision to a plaintiff to deliver interrogatories to the defendant before the delivery of the statement of defence. But the plaintiff must shew “reasonable grounds” for this indulgence.**

The plaintiff in one case was allowed, after issue joined,†† and the defendant in another case after the action was set down for hearing,‡‡ to administer interrogatories.

Where it is sought to administer interrogatories after the pleadings have closed, an affidavit is generally necessary. §§ The affidavit must shew that the deponents (the plaintiff or defendant and his solicitor) believe (1) that the party proposing to interrogate will derive material benefit in the

* 2 Ch. D., 704; 45 L. J. (Ch.), 532; 35 L. T., 301; 24 W. R., 663.

† *Ubi supra*. ‡ 1 Charley's Cases (Chambers), 100. § *Ib*.

|| *Hawley v. Reade*, 2 Charley's Cases (Chambers), 53.

¶ Coe's Practice of the Judges' Chambers, 92.

** *Ochsley v. Redfern*, *Times*, Thursday, June 15th, 1876.

†† *McCorquodale v. Bell and another*, 2 Charley's Cases (Chambers), 49. Per Lindley, J.

‡‡ *The London and Provincial Marine Insurance Company v. Davies*, W. N., 1877, p. 129.

§§ 1 Charley's Cases (Chambers), 100. Per Lush, J. But see *Ellis v. Ambler*, 36 L. T., 410.

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Order XXXI., cause from the discovery; (2) that there is a good cause of action or defence upon the merits; and (3) in the case of a defendant, that the discovery is not sought for the purpose of delay.*

Rule 1.

The jurisdiction of the Court of Chancery having been transferred to the High Court of Justice, and the Supreme Court of Judicature Act, 1873, section 24, subsection (7), providing that the High Court of Justice shall in every cause grant all such remedies in respect of any equitable claim as the parties are entitled to, discovery of the name of the printer or publisher of a newspaper which, under 6 & 7 Wm. IV. c. 76, sec. 19, before the passing of the Supreme Court of Judicature Acts, could only have been obtained in Equity by filing a bill of discovery, can now be obtained by administering interrogatories in any cause before any Division of the High Court of Justice, even although the cause may have been entered for trial before the Supreme Court of Judicature Acts came into operation.†

An interrogatory as to the receipts of the business of a public-house prior to its sale, was allowed ‡ by Archibald, J., at chambers.

In an action for breach of promise of marriage, interrogatories as to the defendant's means are pertinent and will be allowed. Per Quain, J., at chambers.§ Lindley, J., at chambers, on the other hand, struck out similar interrogatories.||

In an action on a policy of insurance, the defendant, an underwriter, assignee of the policy, denied the facts alleged by the plaintiff. Held, that the plaintiff had a right to interrogate the defendant as to these facts.¶

An interrogatory as to documents cannot now be put without leave. The proper course is to proceed under Rule 12 of this Order, and not under Rule 1.**

In an action for damage by collision in the Admiralty Division, the plaintiff will not be allowed to deliver to the defendant, before the close of the pleadings, interrogatories seeking for information which would be disclosed by the defendant's "preliminary act."††

In an action against an auctioneer for the price of a horse sold by him for the plaintiff, to which the defendant pleaded fraud, the defendant was not allowed to ask "whether the horse was plaintiff's," and, "if so, how did it become his."‡‡

Interrogatories, so framed that it was almost impossible for the defendant to answer them, were ordered to be reformed, so that the defendant might be able to say "Yes" or "No" to them.§§

Rule 2.

The Court in adjusting the costs of the action shall, at the

* Coe's Practice of the Judges' Chambers, 92.

† Ramsden v. Brearley, 1 Charley's Cases (Chambers), 96.

‡ Bartholemew v. Rawlings, 2 Charley's Cases (Chambers), 56.

§ 1 Charley's Cases (Chambers), 105.

|| 2 Charley's Cases (Chambers), 54.

¶ 2 Charley's Cases (Chambers), 58. Per Denman, J.

** Pitten v. Chatterburg, 1 Charley's Cases (Chambers), 106. Per Quain, J. †† The "Biola," 24 W. R., 524; 34 L. T., 185.

‡‡ Sirier v. Harris, 2 Charley's Cases (Chambers), 54. Per Lindley, J.

§§ Armitage v. Fitzwilliam, 2 Charley's Cases (Chambers), 57. Per Archibald, J.

instance of any party, inquire or cause inquiry to be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the Taxing Master or of the Court or Judge that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault.

Order XXXI.,
Rule 3.

This Rule is a re-enactment of the second part of Rule 25 of the Principal Act.

The Rule is founded on the principles laid down in Order XL., Rules 9 and 10, of the Consolidated Orders of the Court of Chancery.

See the note to Rule 1 of this Order and the Rules of the Supreme Court (Costs), General Provisions, § 18.

Rule 3.

Interrogatories may be in the Form No. 7 in Appendix (B) hereto, with such variations as circumstances may require.

The form is taken from the one in use in Chancery practice, as will be seen on comparing it with the forms given in Daniel's Chancery Forms, p. 359, and with Chitty's Common Law Forms, p. 168.

Rule 4.

If any party to an action be a body corporate or a joint-stock Company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply at chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

This Rule is copied from section 51 of the Common Law Procedure Act, 1854, so far as "bodies corporate" are concerned. It was held in *McKewan P. O. v. Rolt*,* that the words of that enactment, "any of the officers of a body corporate" extended to the public officer of a joint-stock bank under 7 Geo. IV. c. 46. It will be seen that by the present Rule provision is expressly made for administering interrogatories "to any member or officer" of "a joint-stock company, whether incorporated or not." Provision is also made for administering interrogatories "to any member or officer" of "any other body of persons empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person."

* 4 H. and N., 738; 28 L. J. (Ex.), 380.

**Order XXXI.,
Rule 4.**

A defendant to a suit brought by a sovereign State or corporation has no right to a stay of proceedings in the original suit until a person selected by him for the purpose of discovery, and made a co-defendant to a cross suit, appears to such cross suit. *Semble*, where a defendant has a right to discovery, the Court will stay proceedings in a suit brought by a sovereign State or corporation until such State or corporation has *bond fide* named a proper person to give the discovery sought for.*

A summons for leave to deliver interrogatories to the officer of a defendant was adjourned till after the delivery of the statement of defence, on the ground that the interrogatories might then prove to be unnecessary. Where leave is requisite, the interrogatories may be gone into on the application for it.†

Interrogatories delivered to a defendant company, *without leave*, under the present Rule, will be struck out under Rule 5 of this Order, *infra*.‡

Rule 5.

Any party called upon to answer interrogatories, whether by himself or by any member or officer, may, within four days after service of the interrogatories, apply at chambers to strike out any interrogatory, on the ground that it is scandalous or irrelevant,§ or is not put *bond fide* for the purposes of the action, or that the matter inquired after is not sufficiently material at that stage of the action, or on any other ground. And the Judge, if satisfied that any interrogatory is objectionable, may order it to be struck out.

See, as to this Rule, the notes to Rule 1 of this Order, *supra*, and to Rule 8 of this Order, *infra*.

This Rule is a more elaborate statement of the principle laid down in the second portion of the first part of Rule 25 of the Principal Act, *supra*.

The Rule is founded on the principles laid down in Order XXXV., Rule 60, and Order XVI., Rule 21, of the Consolidated Orders of the Court of Chancery. See also Order XXVII., Rule 1, *supra*.

As the power of administering interrogatories, *without leave*, has now been very largely conceded by Rule 1 of this Order, *supra*, the present Rule is intended to guard against the abuse of this power.

* *The Republic of Costa Rica v. Erlanger; Erlanger v. The Republic of Costa Rica*, 1 Ch. D., 171; 24 W. R., 109, 151; 1 Charley's Cases (Court), 110, 113.

† *Hewetson v. The Whittington Life Insurance Society*, 1 Charley's Cases (Chambers), 101. See the note to Rule 1 of this Order, *supra*.

‡ *Carter v. The Leeds Daily News Company and Jackson*, 1 Charley's Cases (Chambers), 101. Per Archibald, J.

§ "Irrelevant." See *Smith v. Berg and Wife*, 36 L. T., 471, and *Church v. Perry*, 36 L. T., 513.

The present Rule gives the Judge at chambers "THE WIDEST DISCRETION" as to striking out interrogatories. Interrogatories delivered without leave, in an action under the old system, were struck out by Lush, J., at chambers.*

Order XXXI,
Rule 5.

Interrogatories delivered, without leave, in an action for penalties brought by a common informer, were ordered by Lush, J., at chambers, to be struck out, by analogy to the practice in Equity not to allow discovery where, if given, the party interrogated would be liable to penalties.†

In an action of ejectment by a mortgagee against a mortgagor, forty-five interrogatories, delivered by the defendant, were struck out as irrelevant, by Lindley, J., at chambers, without prejudice to any fresh interrogatories which the defendant might be advised to deliver.‡

In the case of *Mansfield v. Childerhouse*,§ which was an action to enforce specific performance of an agreement by the defendant to sell the plaintiffs an underlease of some property at St. John's Wood, the defendant, observing in the statement of claim that the plaintiffs described themselves as trustees for a married woman, administered interrogatories to them as to the nature of their trust, and the custody of their trust-deed, and enquired, whether it was "not a breach of trust to apply their trust funds in the purchase of premises held by way of underlease?" Although the statement of defence raised the question of the plaintiff's authority to purchase, Vice-Chancellor Bacon struck out the interrogatories, as "wholly irrelevant." The plaintiff sued the defendants as man and wife, and then asked them if they were married. The interrogatory was struck out.||

In an action for delivery of milk of inferior quality, interrogatories asking the defendant "who skimmed the milk that was supplied to us?" and whether it was "habitually or occasionally done?" were struck out by Lush, J., at chambers.¶

In an action by a principal against his agent for money received, to which the defence was a traverse of the agency, the defendant's interrogatories which went to shake the plaintiff's good character were struck out by Quain, J., at chambers.** Such interrogatories were "not put *bonâ fide* for the purposes of the action."††

In an action for non-acceptance of patent button-fastening machines, interrogatories, delivered by the defendant to the plaintiffs, as to the French law on the subject, were struck out by Mr. Justice Archibald, at chambers, his lordship observing that "the plaintiffs could not be regarded as experts in French law." Two other interrogatories in the same case, which went to prove that the plaintiffs had bought the goods cheaply, were also struck out.‡‡

In an action for libel against the publisher of a newspaper, interroga-

* 1 Charley's Cases (Chambers), 104; *The "Biola,"* 34 L. T., 185; 24 W. R., 524; *Mercier v. Cotton*, 1 Q. B. Div., 442; 46 L. J. (Q. B.), 184; 35 L. T., 79; 24 W. R., 566. See the note to Rule 1 of this Order, *supra*.

† 1 Charley's Cases (Chambers), 104.

‡ 2 Charley's Cases (Chambers), 55.

§ 4 Ch. D., 82; 46 L. J. (Ch.), 30; 35 L. T., 590; 25 W. R., 68.

|| *Smith v. Berg and Wife*, 36 L. T., 471.

¶ 1 Charley's Cases (Chambers), 103.

** *Baker v. Newton*, 1 Charley's Cases (Chambers), 107.

†† *Coe's Practice of the Judges' Chambers*, 98.

‡‡ *Phillips v. Barron*, 2 Charley's Cases (Chambers), 56.

Order XXXI., Rule 5. tories asking the defendant if he was himself *the* writer of the libel, and also asking to whom the libel applied, if not to the plaintiff, were struck out by Quain, J., at chambers.* But the plaintiff may administer interrogatories to the defendant asking him if he is *the* printer and publisher of the newspaper in which the libel appears.†

In an action for libel, interrogatories which were administered, in support of a plea of justification, by the defendant to the plaintiff, asking him what articles he had written, were struck out by Archibald, J., at chambers. The defendant might, however, have asked, "Did you not, in certain papers, write such and such articles?"‡

In an action for rent, a summons to strike out the plaintiff's interrogatories was adjourned by Lush, J., at chambers, till after the delivery of the statement of defence, on the ground that they might then prove to be unnecessary.§

That interrogatories, otherwise unobjectionable, are merely open to criticism, is no reason for striking them out.||

Rule 6.

Interrogatories shall be answered by affidavit to be filed within ten days, or within such further time as a Judge may allow.

Section 51 of the Common Law Procedure Act, 1854, required the opposite party, "within ten days, to answer the questions in writing by affidavit to be filed." The present Rule gives a Judge power to vary the time.

Rule 7.

An affidavit in answer to interrogatories shall, unless otherwise ordered by a Judge, if exceeding *three* folios, be printed, and may be in the Form No. 8 in Appendix (B) hereto, with such variations as circumstances may require.

The form is similar, *mutatis mutandis*, to that given in Archbold's Forms, p. 171.

By Rule 11 of the Order of March 6, 1860, the Court of Chancery enjoined that "where a plaintiff is required to answer interrogatories, he is to get his answer printed."

See Order XIX., Rule 5, *supra*; and, as to printing, the Rules of the Supreme Court (Costs), Orders I. to V., *infra*.

The inconvenience of limiting the amount of matter in an affidavit, allowed to be written, to three folios, led to the adoption of the new Rule 7a, by which the amount is raised to ten folios.

Where a long schedule forms an integral part of an affidavit, the

* *Wilton v. Brignell*, 1 Charley's Cases (Chambers), 105.

† *Ramsden v. Brearley*, 1 Charley's Cases (Chambers), 96, cited under Rule 1 of this Order, *supra*.

‡ *Buchanan v. Taylor*, 2 Charley's Cases (Chambers), 57.

§ 1 Charley's Cases (Chambers), 105.

|| *Winters v. Dabbs*, 2 Charley's Cases (Chambers), 54. Per Lindley, J.

Record and Writ Clerks have no authority to file it, unless it is printed pursuant to this Rule, or the Court has ordered it to be filed in writing. The difficulty may, however, be avoided by making the Schedule an exhibit.*

Order XXXI.,
Rule 7.

"Unless otherwise ordered by a Judge." In *Webb v. Bomford*, Hall, V.C., availed himself of this power to order an affidavit in answer to interrogatories, and the schedule thereto, to be written, instead of being printed. The affidavit in that case contained only 25 folios, but the schedule contained 200 folios, and the printing of the schedule alone would have cost £18.

Rule 7a.

In Order XXXI., Rule 7, of The Rules of the Supreme Court, the word "ten" is hereby substituted for the word "three" before the word "folios."

This new Rule was added by the Rules of the Supreme Court, June, 1876, Rule 11, to obviate the inconvenience of limiting the amount of matter, in an affidavit, allowed to be written to three folios by Rule 7 of this Order.

Rule 8.

Any objection to answering any interrogatory may be taken, and the ground thereof stated in the affidavit.

This was the Rule embodied in the practice at Common Law, under the Common Law Procedure Act, 1854, s. 51. The answers were required to follow the order of the interrogatories and answers, and assign reasons for not answering each interrogatory specifically. *Chester v. Wortley*.†

The Rule is perfectly distinct from Rule 5 of this Order, *supra*, which enables the Judge at chambers to strike out interrogatories. It applies where there are special reasons for not answering an interrogatory, though the interrogatory may be, in itself, unobjectionable.‡

An interrogatory may be left unanswered, if the objection is one of law; *secus*, if one of fact. Per Lindley, J., in *Smith v. Berg and Wife*.§

Rule 9.

No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court or a Judge on motion or summons.

This Rule is a re-enactment of the last portion of the first part of Rule 25 of the Principal Act, the words "any affidavit in," being inserted before "answer," and "such affidavit," being substituted for "any answer."

* *Webb v. Bomford*, 46 L.J. (Ch.), 288; 25 W. R., 251; W. N., 1877 p. 5. † 18 C. B., 239.

‡ See Coe's Practice of the Judges' Chambers, 95.

§ 36 L. T., 471. See also *Church v. Perry*, 36 L. T., 513.

**Order XXXI.,
Rule 9.**

The Rule contains a reference to the Chancery Practice of "excepting" to answers to interrogatories, and for the future forbids it.

If the plaintiff in Equity, upon due examination of the defendant's answer to his interrogatories, found that it contained scandalous matter or was insufficient, he might have filed "exceptions" to it, stating the particular points to which he took exception. Separate exceptions were required to separate answers. The exceptions were heard in open Court, and, if allowed, the defendant had to answer further. After a third insufficient answer the defendant stood committed for contempt.

The defendant might also have excepted to the plaintiff's answer to his interrogatories.*

"Determined by the Court or a Judge." See the next Rule.

Rule 10.

If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a Judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer, or answer further, either by affidavit or by *vivâ voce* examination, as the Judge may direct.

See the 53rd section of the Common Law Procedure Act, 1854, as to the *vivâ voce* examination of the interrogated party.

"Answer further." This, like the "exceptions to answer," is an expression borrowed from the Chancery Practice. The "further answer" extended only to interrogatories which had not been answered, or answered sufficiently, previously. Repetition of anything contained in the former answer was regarded as "impertinent," and the defendant might have been made to pay the costs occasioned by the introduction of the impertinent matter.†

The present Rule follows the Common Law Practice, although it uses Chancery phrases.

By s. 53 of the Common Law Procedure Act, 1854, "in case of omission, without just cause, to answer sufficiently written interrogatories, it shall be lawful for the Court or a Judge, at their or his discretion, to direct an *oral examination* of the interrogated party, as to such points as they or he may direct, before a Judge or a Master. An application under this section should be made at chambers in the first instance."‡ The present Rule gives the party interrogating the alternative of applying for a further *affidavit*, in lieu of an *oral* or *vivâ voce* examination of his opponents.

Although this Rule says that the application may be made "to the Court or a Judge," Vice-Chancellor Hall has decided that the application should (in the Chancery Division, at all events) be by summons at chambers, and not by motion in Court. The particular answers objected

* See as to "Exceptions to Answers," Daniel's Chancery Practice, chap. XVII., section 4, and chap. XXXIV., section 1.

† 15 & 16 Vict. c. 86, s. 17. See as to "Further answers," Daniel's Chancery Practice, chap. XVII., section 5.

‡ *Bender v. Zimmerman*, 29 L. J. (Ex.), 244.

to on the ground of "insufficiency" should, also, be expressly indicated. **Order XXXI., Rule 10.**
 Plaintiffs, who applied by motion, and did not specify the particular answers objected to, were refused by Vice-Chancellor Hall the costs of the application.*

In an action for slander, the defendant objected to answer an interrogatory (as to whether he had been using the slanderous words attributed to him) on the ground that he was "advised, and believed that the plaintiff was not entitled to this discovery." The defendant was ordered, by Quain, J., at chambers, to answer further. He should have applied to strike out the interrogatory.†

Rule 11.

It shall be lawful for the Court or a Judge at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such action or proceeding, as the Court or Judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

This Rule is a re-enactment of Rule 27 of the Principal Act.

The Rule is copied from s. 18 of the Chancery Amendment Act, 1852 (15 and 16 Vict. c. 86). That section, however, only applies to production by a defendant. S. 20 of the same Act applies to production by plaintiffs, but only after answer by the defendant. The present Rule applies to "production by any party," at any time during the pendency of any action or proceeding. "Production on oath" means production accompanied by affidavit. A form of such an affidavit is given in the Schedule to the regulations as to business at Chancery Chambers of August 8th, 1857, and will be found set out in full at p. LIX. of Morgan and Chute's Chancery Acts and Forms (4th edition). See the note to Rule 18 of this Order, *infra*.

The practice under this Rule and the next will be grouped under the latter. As to production, see, also, Rule 14 of this Order, *infra*.

Rule 12.

Any party may, without filing any affidavit, apply to a Judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question in the action.

* *The Chesterfield and Boythorpe Colliery Company, Limited, v. Black*, 24 W. R., 783; W. N., 1876, p. 204.

† 1 Charley's Cases (Chambers), 107.

**Order XXXI.,
Rule 12.**

The Common Law enactment as to the "discovery of documents" is section 50 of the Common Law Procedure Act, 1854, to which, and to Mr. Day's notes * upon it, reference may be made.

This Rule is taken from that section of the Common Law Procedure Act, 1854, with the alteration, that no affidavit is required on applying. But see *Johnson v. Smith*,† cited *infra*. Discovery on oath means discovery on affidavit. See Rule 13 of this Order, *infra*. Although this Rule is taken from the Common Law Procedure Act, 1854, yet, having regard to s. 25, subs. (11), "the rules of Equity shall prevail," the rules previously existing respecting discovery in the Court of Chancery are applicable to the practice under it. *Anderson v. The Bank of British Columbia*;‡ *Bustros v. White*.§

It is not in accordance with the practice of the Court of Chancery to make an order for production of documents on *the solicitor of a party* to an action.||

A summons must be taken out at chambers under the present Rules.¶ In actions, moreover, begun before the 1st of November, 1875, an order for discovery of documents can only be obtained on affidavit. (Per Lush, J., at chambers.)**

In an action by a landlord, against his tenant, on a lease, an order for discovery of documents is now given as a matter of course. (Per Quain, J., at chambers.)†† The same learned Judge, indeed, broadly stated in another case before him at chambers, that the order for an affidavit of documents will in all cases be granted as a matter of course without any statement of their nature.‡‡

In an action, however, for half a year's rent, Mr. Baron Huddleston, at chambers, intimated that *some slight grounds* must be shown for discovery of receipts of rent.§§

In an action of ejectment a discovery of unknown documents was refused by Lush, J., at chambers.||||

A similar course was taken by the Exchequer Division in *Johnson v. Smith*,¶¶ which was an action for seduction.

Mr. Justice Lindley, in a case at chambers, decided that in an action of ejectment discovery of the plaintiff's title-deeds cannot be ordered, unless the defendant can show that the documents are relevant to his case.***

In another case Mr. Justice Lindley decided that it is no bar to a discovery of documents that the applicant names no document in his opponent's possession. He cannot know what documents the party summoned has, until he gets the affidavit of documents. The *onus* is on the party summoned, the applicant being entitled to discovery of documents, as a matter of course, unless the party summoned can sustain an objection to his having it.†††

The Court of Appeal has practically affirmed this view of the law. In

* Pp. 295-304, 4th edition.

† 36 L. T., 741; 25 W. R., 539.

‡ 2 Ch. D., 644; 45 L. J. (Ch.), 449; 35 L. T., 76; 24 W. R., 624.

§ 1 Q. B. D., 422; 45 L. J. (Q. B.), 642; 34 L. T., 835; 24 W. R., 721.

|| *Cashin v. Cradock*, 2 Ch. D., 140; 34 L. T., 52. Per Bacon, V.C.

¶ 1 Charley's Cases (Chambers), 108. ** *Ibid*.

†† 1 Charley's Cases (Chambers), 110. ‡‡ *Ibid*.

§§ *Mostyn v. The Western Coal and Iron Company*, 1 Charley's Cases (Chambers), 111.

|||| 1 Charley's Cases (Chambers), 109.

¶¶ 25 W. R., 539.

*** Charley's Cases (Chambers), 112.

††† 2 Charley's Cases (Chambers), 59.

*Bustros v. White** the Court of Appeal unanimously decided that a Judge had no power to refuse to make an order for the production of documents under these Rules, except on the ground of *privilege*. What communications are, and what communications are not, privileged depends on the former practice of the Court of Chancery.

Order XXXI.,
Rule 12.

Documents are protected from production by *quasi*-professional, as well as by professional privilege: communications addressed by the plaintiff or defendant to his solicitor, or by his solicitor to him, in relation to the subject-matter of the action, are protected from production by professional privilege. Communications forwarded at the instance of the plaintiff's or defendant's solicitor by an agent employed by him or employed by his client on his recommendation, are protected by *quasi*-professional privilege. But letters written to the plaintiff by his mercantile agent, expressing an opinion as to his chance of success in the action; letters written to the defendant by the agent of the company from whom he bought the goods, in respect of which the action was brought, agreeing to allow him a deduction on the invoice price, and letters written by the branch manager of a defendant company to the London manager of the same company, at the request of the latter, in explanation of the transaction on which the action is founded, are not privileged.†

An order for the discovery of documents now includes documents *formerly* in the party's power, but which have ceased to be so. (Per Lush, J., at chambers.)‡

Where the defendant, a bankrupt, swore that he had no documents in his possession, he was required, by Lindley, J., at chambers, to state what documents passed from him to the trustee, and the fact of their so passing.§

The Exchequer Division, however, in the case of *Fraser v. Burrows*,|| decided that there is no power to order the production of documents not under the party's control or in his possession.

In an action of libel the defendant must, if he has not got the original letters containing the alleged libel, state in his affidavit what he has done with them. (Per Lush, J., at chambers.)¶

It is now in the discretion of the Judge at chambers to allow discovery of documents in an action for penalties. (Per Huddleston, B., at chambers.)**

In an action by the owners of goods against the owners of a ship, in which the goods had been carried, for damage done to the goods in a collision with another ship, the defendants were ordered by the Queen's Bench Division (affirming the decision of Mr. Justice Quain, at chambers) to produce (1) an agreement whereby they and the owners of the other ship had compromised cross-suits of damage instituted in the Court of Admiralty, and (2) an average statement made on the basis of the agreement.††

* 1 Q. B. D., 422; 45 L. J. (Q. B.), 642; 34 L. T., 835; 24 W. R., 721.

† *Bustros v. White*, *ubi supra*; *English v. Tottis*, 1 Q. B. D., 141; 45 L. J. (Q. B.), 138; 33 L. T., 724; 24 W. R., 393; *Anderson v. The Bank of British Columbia*, 2 Ch. D., 644; 45 L. J. (Ch.), 449; 35 L. T., 76; 24 W. R., 624; *Martin v. Butchard*, 36 L. T., 732.

‡ 1 Charley's Cases (Chambers), 108.

§ 2 Charley's Cases (Chambers), 60. || W. N., 1877, p. 76.

¶ 1 Charley's Cases (Chambers), 109.

** *The Society of Apothecaries v. Nottingham*, 1 Charley's Cases (Chambers), 110.

†† *Hutchinson v. Glover*, 1 Q. B. D., 138; 45 L. J. (Q. B.), 120; 33 L. T., 605; 24 W. R., 185; 1 Charley's Cases (Court), 120.

**Order XXXI.,
Rule 12.**

In an action for negligence against a railway company, insufficient lighting of the station being alleged as one of the causes of the accident, a discovery of documents relating to the lighting of the station was ordered by Archibald, J. A cross-summons by the defendant company for discovery of the plaintiff's business accounts for the previous five years was also allowed by the same learned Judge.*

An order was made by Lindley, J., at chambers, for discovery of documents before the delivery of a statement of claim, in an action for damages for overloading a ship.†

In *Cashin v. Craddock*,‡ Vice-Chancellor Bacon refused to make an order for production of documents by the defendant before the delivery of the statement of claim. But his lordship said that the decision of Mr. Justice Lindley in the last case (which had been cited by the Counsel for the plaintiff), had not the slightest application to the case before him.

An application by a defendant for an affidavit of documents by the plaintiff, a foreigner, resident abroad, was refused by Quain, J., at chambers, as the effect of granting the application would have been to throw the plaintiff over the then sittings; in the event of the plaintiff, however, not giving notice of the trial, the application might, his lordship said, be renewed.§

When an order for production of documents is made upon the owner of a foreign ship, who has appeared to defend an Admiralty action *in rem*, a reasonable time will be allowed the defendant to make his affidavit in reply.||

The Judge, and not the Referee, is the proper person to make an order for the production of documents which may be necessary for the purposes of the reference.¶

Semble, where proceedings are taken under the Companies' Acts (*e.g.*, to strike off the name of a contributory), the Judge has power to order the production of documents, though there is no action pending between the parties.**

Although Rule 12 says that the party may apply without an affidavit, the Judge, in his discretion, may require one.††

Where, on an application at chambers for production under these Rules, the documents themselves are, with the consent of both parties, *handed to the Judge*, who takes upon himself the trouble of *looking through them*, and decides whether they ought or ought not to be produced, it will not be competent for either party to *appeal* from his decision.‡‡

See also, as to these Rules, *The Welsh Steam Coal Collieries Company v. Gaskell*,§§ and *Fraser v. Burrows*.|||

Rule 13.

The affidavit to be made by a party against whom

* 2 Charley's Cases (Chambers), 60.

† *Ley v. Marshall*, 2 Charley's Cases (Chambers), 59.

‡ 2 Ch. Div., 140; 34 L. T., 52.

§ 1 Charley's Cases (Chambers), 110. || *The "Emma,"* 24 W. R., 587.

¶ *Rowcliffe v. Leigh*, 4 Ch. D., 661; 46 L. J. (Ch.), 60; 25 W. R., 56.

** *In Re The National Funds Assurance Company*, 4 Ch. D., 303; 24 W. R., 774. †† *Johnson v. Smith*, 36 L. T., 741; 25 W. R., 539.

‡‡ *Bustros v. White*, 1 Q. B. D., 422; 45 L. J. (Q. B.), 642; 34 L. T., 835; 24 W. R., 721. §§ 36 L. T., 352; 12 N. C., 38.

||| W. N., 1877, p. 76.

such order as is mentioned in the last preceding Rule has been made, shall specify which, if any, of the documents therein mentioned he objects to produce; and it may be in the Form No. 9 in Appendix (B) hereto, with such variations as circumstances may require.

Order XXXI.,
Rule 13.

“Such order as is mentioned in the last preceding Rule.” It is not a little curious, as illustrating what a remarkable mosaic the present Schedule is, that the Form No. 9, in Appendix (A), hereto is copied *verbatim* from the form prescribed, as we have seen, to be used under sections 18 and 20 of the Chancery Amendment Act, 1852, and would therefore appropriately belong only to Rule 11 of this Schedule, which is copied from that enactment. The two Rules being, however, identical in their object, so far as discovery of documents is concerned, the form of affidavit of documents is applicable to both.

In an action begun before the 1st of November, 1875, but continued after that date, the affidavit of documents must be in accordance with Form 9 of Appendix (B).*

The Form No. 9 in Appendix (B) is not optional. It is exhaustive in its terms, and must be followed.†

Where an affidavit has been made in answer to an order for discovery of documents, a *further* order will not be granted unless there are facts or admissions shewing that documents are withheld.‡

Rule 14.

Every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice.

* 1 Charley's Cases (Chambers), 112.

† Per Lindley, J., at chambers, 2 Charley's Cases (Chambers), 71.

‡ *The Welsh Steam Coal Collieries Company v. Gaskell*, 36 L. T., 352, 12 N. C. 38.

Order XXXI., This Rule is a re-enactment of Rule 26 of the Schedule to the Principal
Rule 14. Act.

See note to Rule 18 of this Order, *infra*.

By Order XIX., Rule 24, *supra*, it is sufficient in any pleading to state the effect of any material document as briefly as possible. The present Rule supplements that Rule very usefully, by enabling the opposite party to inspect the document so referred to by a simple interchange of notices between the parties. In case the party noticed to produce the document for inspection, omits or objects to give inspection, the opposite party may, under Rule 17 of this Order, *infra*, apply to a Judge for an order for inspection.

It was a rule of the Court of Chancery that a party could only have inspection of documents which related to his own case.

The great advantage of the new system of inspection introduced by Rules 14, 15, and 16 of this Order is, that an application for an order to inspect, either to the Court or a Judge, is unnecessary. The proceeding is a friendly one *inter partes*, conducted by a series of notices on either side. It is not until the party noticed to give inspection omits or refuses to give it, that it becomes necessary to have recourse to a Judge, under Rules 17 and 18 of this Order, *infra*. This is a decided improvement on s. 6 of Lord Brougham's Evidence Act (14 & 15 Vict. c. 99), s. 50 of the Common Law Procedure Act, 1854, and ss. 18 and 20 of the Chancery Amendment Act, 1852, all of which require an application to the Court or to a Judge at chambers for an order to inspect, in the first instance.

By the Rules of the Supreme Court (Costs), it is provided* that no allowance is to be made for any notice or inspection, under the present Rule, unless it is shown to the satisfaction of the taxing master that there were good and sufficient reasons for giving such notice and making such inspection.

Inspection under the present Rule was refused by the Queen's Bench Division, affirming the decision of Field, J., at chambers, in a case falling under the old procedure.†

In an action of ejectment by mortgagees against the mortgagor's executors, an application for leave to inspect the mortgage deed (a document mentioned in the statement of claim), to ascertain the amount of the mortgage, was refused by Lindley, J., at chambers, the plaintiff undertaking to state the amount.‡

In an action for breach of covenant in a lease, where the defendant had assigned an undivided moiety of the property, inspection of documents was ordered by Archibald, J., at chambers, although (as alleged) relating solely to the defendants' title.§

In an action of trespass, inspection of two documents, mentioned in the pleadings, was sought by the plaintiff, and refused by Archibald, J., at chambers, the defendant objecting that these documents were his own title-deeds, as freeholder.||

Rule 15.

Notice to any party to produce any documents referred

* Special Allowances, section 15.

† *Mathias v. Delcacho*, 1 Charley's Cases (Court), 123.

‡ 2 Charley's Cases (Chambers), 61.

§ *Lake v. Pooley*, 2 Charley's Cases (Chambers), 62.

|| 2 Charley's Cases (Chambers), 62.

to in his pleading or affidavits shall be in the Form **Order XXXI., Rule 15.**
No. 10 in Appendix (B) hereto.

See, as to this notice, the Rules of the Supreme Court (Costs), Special Allowances, section 18, cited under Rule 14.

This notice is, technically speaking, not a notice to produce, but a notice to *inspect*. The expression "notice to produce" was used in the case of a summons in Equity to inspect at chambers. See Daniel's "Forms," 1191. The Form No. 10 in Appendix (B) is framed on that model.

Rule 16.

The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in Rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice may be in the Form No. 11 in Appendix (B) hereto, with such variations as circumstances may require.

The form of notice states that the documents can be inspected at the office of the solicitor of the party. "The Court of Chancery," Mr. Daniel observes,* "now usually orders the production at the place of business of the party's solicitors."

The charge for copies of, or extracts from, the documents, if made by the solicitor of the party producing the documents, is 4d. per folio, but if, on the neglect or refusal of such solicitor to make such copies or extracts, the copies or extracts are made by the solicitor of the party inspecting the documents, no fee is payable to the solicitor of the party producing the documents for such copies or extracts.†

Rule 17.

If the party served with notice under Rule 15

* Daniel's Chancery Practice, p. 1696.

† Rules of the Supreme Court (Costs), Special Allowances, s. 16.

Order XXXI., omits to give such notice of a time for inspection, or
Rule 17. objects to give inspection, the party desiring it may apply to a Judge for an order for inspection.

This is the first appearance of a Judge upon the scene in this new practice of obtaining inspection. See the Note to Rule 14 of this Order, *supra*. As to the mode of applying for an order for inspection under this Rule, see the next Rule.

Rule 18.

Every application for an order for inspection of documents shall be to a Judge; and except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.

Frequently in these Rules the first sentence of a Rule is a mere repetition, in slightly altered phraseology, of the last sentence of the preceding one, and it is pretty clear that such is the case in the present instance. "Every application" is, therefore, equivalent here to "every application under the last preceding Rule."

The application must be by summons at chambers. The order generally is that the inspection take place at the office of the solicitor of the party summoned, on payment to such solicitor of 6s. 8d. costs and 4d. per folio for copies or extracts. If such solicitor, however, refuses or neglects to supply the copies or extracts, the solicitor requiring them may make them, and in that event (as already stated) no fee per folio is payable to the solicitor of the party summoned.*

In an action of ejectment, inspection of private memoranda of statements made by the defendant as to the relationship which he alleged to exist between the late owner of the property (who died intestate) and himself, was refused by the Judge at chambers (Lush, J.).†

An application by the defendant for inspection of a ship's papers was granted by Lush, J., at chambers, *before appearance*, in an action for damages on a policy of insurance of the ship, the plaintiff having power, under Order XIII., Rule 6, to sign judgment in case of default of appearance.

Rule 19.

If the party from whom discovery of any kind or

* See Coe on the Practice of the Judges' Chambers, 101, 102; and the Rules of the Supreme Court (Costs), Special Allowances, s. 16.

† *Mattock v. Heath*, 1 Charley's Cases (Chambers), 112, 113.

inspection is sought objects to the same, or any part thereof, the Court or a Judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

Order XXXI.,
Rule 19.

In *Wood v. The Anglo-Italian Bank*,* which was an action for the recovery of a commission, Lindley, J., at chambers, refused two applications by the plaintiff, one for leave to add a new count to the declaration, setting up a different contract from that already stated in the declaration, the other for leave to administer interrogatories founded on this new count. The Common Pleas Division, to which the plaintiff appealed, considering that the materiality of the discovery sought depended upon the "determination of the issue" raised by the new count, sanctioned the addition of the new count, and ordered, under the powers conferred upon the Court by the present Rule, that "the issue" raised by the new count should be "determined first," and that "the question of discovery" should be "reserved" till after the determination of such issue.

Rule 20.

If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out,† and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly.

Under s. 51 of the Common Law Procedure Act, 1854, any party omitting, without just cause, sufficiently to answer all questions as to which discovery might be sought was to be deemed to have committed a contempt of Court and be liable to be proceeded against accordingly, i.e., to be attached (1 Wm. IV. c. 22, s. 5).

* 34 L. T., 255; *Times*, Monday, February 21st, 1876, where the reporter prefaces the case by saying that it "illustrated the convenience of the power vested in the Court by the present Rule."

† See Order XXVII., Rule 1, *supra*.

**Order XXXI.,
Rule 20.**

Attachment for contempt was also the punishment in the Court of Chancery.* In Chancery, also, where an order had been made that the defendant's time for answering should be extended until after the production by the plaintiff of a document stated in the Bill, and the plaintiff neglected to produce the document, it was, on the defendant's motion, ordered that the plaintiff should produce the document within a limited time, or that in default the Bill should be dismissed with costs. *The Princess of Wales v. Lord Liverpool*.†

"Be liable." This Rule does not make it imperative on the Court or Judge to exercise the powers conferred by it.‡

The present Rule is a highly penal enactment, and only to be exercised in the last resort.§

Where a feigned issue was directed, to try whether there was a specific agreement between the parties that the plaintiff, a deceased solicitor's representative, should only charge the defendant costs out of pocket, an application to dismiss the action for want of prosecution in not discovering documents in another suit, in which the deceased was engaged, was refused by Lush, J., at chambers.||

In *Hartley v. Owen*,¶ which was an action by a husband and wife, trading under the name of "Bann and Company," for an injunction to restrain the defendant from holding himself out as a partner in the firm, the wife alone made an affidavit of documents, although an order had been obtained by the defendant for an affidavit of documents by both husband and wife; the husband absconded. Hall, V.C., refused to make an order, under this Rule, dismissing the action.

In an action begun under the old practice, Lush, J., at chambers, refused to allow the plaintiff to proceed under the new practice, when the object was solely to enable him to strike out the defence for default in answering the plaintiff's interrogatories, but gave the defendant a week more in which to answer. A fortnight more having elapsed, and the defendant having failed to answer, Quain, J., at chambers, ordered the defence to be struck out, unless the defendant answered within twenty-four hours.**

The defence of a trustee, whom the plaintiff sought to remove for misconduct, was struck out, for his failing to file an affidavit of documents, by Hall, V.C.††

Where differences had arisen between the real and nominal defendants, and it became necessary to have two solicitors, instead of one, for the defence, Lush, J., at chambers, on an application to strike out the defence for failure to answer the plaintiff's interrogatories, gave the defendants a week more within which to answer.‡‡

An order for an account, under Order XV., Rule 1, cannot be enforced by attachment under this Rule. Neither can an order for a "statement of the names of co-partners," under Order XVI., Rule 10, be so enforced.§§

* Daniel's Chancery Practice, p. 1699. † 3 Swanst., 567.

‡ See per Hall, V.C., in *Hartley v. Owen*, 34 L. T., 752; W. N., 1876, p. 193.

§ 1 Charley's Cases (Chambers), 115. Per Lush, J., at chambers.

|| *Scarth v. Williams*, 1 Charley's Cases (Chambers), 116.

¶ 34 L. T., 752; W. N., 1876, p. 193.

** *Twycross v. Grant*, 1 Charley's Cases (Chambers), 114, 115.

†† 25 W. R., 528.

‡‡ 1 Charley's Cases (Chambers), 116.

§§ *Pike v. Keen*, 24 W. R., 322; 35 L. T., 341.

Rule 21.

Order XXXI.,
Rule 21.

Service of an order for discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order.

See Rule 20 of this Order, *supra*, and Rule 22, *infra*.

Rule 22.

A solicitor upon whom an order against any party for discovery or inspection is served under the last Rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment.

See Rules 20 and 21 of this Order, *supra*.

Rule 23.

Any party may, at the trial of an action or issue, use in evidence any one or more of the answers of the opposite party to interrogatories without putting in the others: Provided always, that in such case the Judge may look at the whole of the answers, and if he shall be of opinion that any other of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in.

This Rule is out of place. It has nothing to do with the production or inspection of *documents*. It would have followed naturally Rule 10 of this Order, *supra*.

The Rule will render interrogatories much more useful at Common Law than formerly, where all of the answers must have been read, or none.

Where, in the latter part of an answer to an interrogatory, the defendant was alleged to have stated the defence to the action, an application that he should answer further, on the ground that the plaintiff could not read the other part of the answer separately at the trial, was refused by Lindley, J., at chambers, the latter part of the answer being merely a qualification of the former part.*

* 2 Charley's Cases (Chambers), 62.

Ord. XXXII.,
Rule 1.

ORDER XXXII.

ADMISSIONS.

Rule 1.

Any party to an action may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the statement of claim, defence, or reply of any other party.

This Rule is a re-enactment of the first part of Rule 39 of the Principal Act.

"It is an essential principle of pleading at Common Law that whatever is not denied is admitted." (Bullon and Leake's "Precedents," p. 436, n.) Where default is made in pleading, the statement of fact in the pleading last delivered is, by Order XXIX., Rule 12, to be "deemed to be admitted." See also Order XXII., Rule 4, *supra*, as to the power to inflict extra costs for refusal to admit allegations of fact which ought to have been admitted.

Admissions might have been made by parties in the Court of Chancery by agreement or otherwise.*

See the First Report of the Judicature Commission, p. 14.

Rule 2.

Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the Court certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the Taxing Officer, a saving of expense.

This Rule is a re-enactment of the second part of Rule 39 of the Principal Act.

The Rule is copied *verbatim* from the Common Law Procedure Act, 1852, sec. 117, except that "hearing" is inserted before "trial," "Court" is substituted for "Judge," and "Taxing-officer" for "Master." See, also, s. 7 of the Chancery Amendment Act, 1858 (21 and 22 Vict. c. 27).

The words of the former enactment are very wide, including every document which a party means to adduce in evidence, and not merely documents in his custody or control,† and even documents, the validity of

* See Daniel's Chancery Practice. c. xxii., s. 1.

† *Rutter v. Chapman*, 8 M. & W., 388.

which is in question in the action;* and the Court will rather enlarge than restrict the provisions of the section (per Alderson, B., in *Rutter v. Chapman*). Ord. XXXII.,
Rule 2.

The admission is to be made "saving all just exceptions." A party, *e.g.*, admitting his handwriting to a bill, is not precluded from objecting to its admissibility in evidence on account of its being unstamped (*Vane v. Whittington*).†

No time is specified for giving the notice to admit, but it has been considered that it must be given *a reasonable time before the trial*.‡

Where a party necessarily *called* as a witness to prove some other part of the case, can prove the documents, the omission of a notice to admit will be excusable, on the ground mentioned in the Rule, that it is "a saving of expense."

An admission once formally made will bind the party making it, even on a new trial.§

Rule 3.

A notice to admit documents may be in the Form No. 12 in Appendix (B) hereto.

The Form No. 12 in Appendix (B) is copied *verbatim* from Reg. Gen., Hil. T., 1853, Rule 29, including the schedules of documents.

Rule 4.

An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents, and annexed to the affidavit, shall be sufficient evidence of such admissions.

This Rule is copied from the Common Law Procedure Act, 1852, section 118, "Solicitor" being substituted for "Attorney in the cause."||

ORDER XXXIII.

INQUIRIES AND ACCOUNTS.

The Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or

* *Spencer v. Barrow*, 9 M. & W., 423.

† 2 Dowl., N. S., 757.

‡ See *Tynn v. Billingsley*, 2 Dowl., 310.

§ *Doe v. Bird*, 7 C. & P. 6.

|| See Day's Common Law Procedure Acts, 4th edn., p. 140. *Doe d. Tindal v. Roe*, 5 Dowl., 420; *Chaplin v. Levy*, 9 Ex., 531. For further information with regard to the subject matter of this Order, see Day's Common Law Procedure Acts, pp. 138, 139, and 140.

Ord. XXXIII. accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

This Rule is a re-enactment of Rule 42 of the Principal Act. It should be read in connection with Order XL., Rule 11, *infra*.*

The Order is copied, nearly *verbatim*, from the recommendations of the Judicature Commission †:—

“The Judge should also be empowered at any time, on summary application in chambers or elsewhere, to direct, if he thinks fit, any necessary inquiries or accounts, notwithstanding it may appear that there is some special or further relief sought, or some special matter to be tried as to which it may be proper that the suit should proceed in the ordinary manner.”

The plaintiff in Equity was empowered by Order XX. of the Consolidated Orders to “move the Court on notice,” at any time *after the defendant had appeared*, that preliminary accounts and inquiries should be taken; and it was held that they might be ordered though the cause was set down for hearing.‡ The accounts and inquiries were ordered “without prejudice to any question in the cause,” but it was necessary that they should be beneficial to the parties not competent to consent thereto, and that the application should be consented to by any of the defendants competent to consent who had not put in their answer, as being proper to be made upon the statements contained in the answers of the defendants who had answered.

The new practice is not hampered by any of these restrictions. The accounts and inquiries may be ordered “at any stage of the proceedings”; the Court or Judge may order them without any motion, or they may be ordered at the instance of either party; and no consents, either express or constructive, are required.

It may be useful to group together here the various methods of investigating accounts and making inquiries provided by the Legislature:—

(1) By Order III., Rule 8, in all cases of ordinary account (as *e.g.* in the case of a partnership, or executorship, or ordinary trust account), where the plaintiff, *in the first instance*, desires to have an account taken, the writ of summons can be endorsed with a claim that such account be taken. By Order XV., Rule 8, in default of appearance to a summons so indorsed, and also after appearance, unless the defendant satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the account claimed, with all directions usual in the Court of Chancery, shall be forthwith made. By s. 34 of the Principal Act, all causes or matters for the purpose of “the taking of partnerships and other accounts” are assigned to the Chancery Division, and it is apprehended

* See *Turquand v. Wilson*, 1 Ch. D., 85; 45 L. J. (Ch.), 104; 24 W. R., 56; 1 Charley’s Cases (Court), 124; and *Rumsey v. Reade*, 1 Ch. D., 643; 45 L. J. (Ch.), 489; 33 L. T., 803; 24 W. R., 245.

† First Report, p. 11.

‡ *Strother v. Dutton*, 10 Sim., 288.

that an action in which the writ has been endorsed under Order III., Ord. XXXIII. Rule 8, would therefore be assigned to the Chancery Division.

In *Irlam v. Irlam*,* Hall, V.C., decided that, in default of appearance, the order under Order XV., Rule 1, can be made by a District Registrar, but not after appearance. After appearance it can only be made by the Court or a Judge.

(2) By s. 3 of the Common Law Procedure Act, 1854 (which is *still* in force†), if it be made to appear, *at any time after the issuing of the writ*, to the satisfaction of the Court or a Judge, upon the application of either party, that the matter in dispute consists wholly or partly of matters of mere account, which cannot conveniently be tried in the ordinary way, the Court or Judge may decide the matter in a summary way, or may order that the matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the Court; and the decision or order of the Court or Judge, or the award or certificate of the arbitrator or officer of the Court, shall be enforceable by the same process as the finding of a jury upon the matter referred.

(3) By s. 57 of the Principal Act, the Court or a Judge may at any time by consent, or without consent where a prolonged investigation of documents or accounts or any scientific or local investigation is required, order any question of account arising in the cause or matter to be tried either before an official or before a special referee. By s. 58, the report of the referee upon any question of fact is equivalent to the verdict of a jury.

(4) By the present Order, the Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, and this either in the London offices, or, under s. 66 of the Supreme Court of Judicature Act, 1873,‡ in the office of any District Registrar. A District Registrar, however, has no power to make such an order. In the case in which this was decided,§ a decree made by a District Registrar, by consent, for the administration of an estate, was declared to be irregular, being *ultra vires*. The Judge (Hall, V.C.) refused to adopt the proceedings in the District Registry; and himself made the usual administration decree, and directed that the accounts and inquiries should be taken and made in the District Registry.

The Court will not direct accounts and inquiries to be taken and made in a District Registry, where it would involve needless expense.||

An order for an account between partners was made by Vice-Chancellor Hall under this Order before the hearing, upon motion by the plaintiff and affidavit of service, the plaintiff appearing to be entitled to such account upon the admissions of fact in the answer. These admissions were—(1) a joint adventure between the plaintiff and defendant for rebuilding and selling a house in Mayfair; (2) the payment by the plaintiff to the

* 2 Ch. D., 608; 24 W. R., 292, 949.

† Supreme Court of Judicature Act, 1875, s. 21; *Cruikshank v. The Floating Swimming Baths Company*, 1 C. P. D., 260; 45 L. J. (C. P.), 684; 34 L. T., 733; 24 W. R., 644; 2 Charley's Cases (Court), 123.

‡ The report in writing of the District Registrar, as to the result of the accounts and inquiries, may, by that enactment, be acted upon by the Court as it thinks fit.

§ *Irlam v. Irlam*, 2 Ch. D., 608; 24 W. R., 292, 949.

|| *Walker v. Robinson*, 24 W. R., 427; 34 L. T., 229.

Ord. ~~XXXXIII~~. defendant of moneys under it; and (3) the defendant had not accounted for those moneys to the plaintiff.*

In *Rumsey v. Reade*,† which was an action by the trustees of a will against their agent for an account and the delivery up of trust deeds, upon the defendant's admission, in his answer to the plaintiff's Bill, that he was their agent and liable to account, and that certain trust deeds were in his possession, Bacon, V.C., on motion under this Order and Order XL., Rule 11, before the hearing, made an order for an account and for the delivery up of the trust deeds.

An order for the usual "inquiries" as to parties interested will be made under Order XL., Rule 11, in a partition action where the statement of defence admits the plaintiff's title as shewn by the statement of claim.‡

Before making an order at chambers under the present Order for an account of a marginal surplus in the hands of the defendants upon a contract for sale, which surplus the plaintiff claims under an alleged agreement by the defendants to pay it to him, but the agreement is not admitted by the defendant, it is necessary that a *prima facie* legal or equitable case should be made out by the plaintiff to the satisfaction of the Judge.§

An application under this Order and Order XL., Rule 11, before the hearing, for an account of what was due to the defendant on a counterclaim on which the plaintiff had joined issue generally, on the ground that the plaintiff had, by not dealing specifically with the allegations of fact in the counterclaim, pursuant to Order XIX., Rule 10, admitted them, was refused by Vice-Chancellor Hall. No order could be made on the counterclaim, in the opinion of his lordship, until the hearing, when the plaintiff's claim and the defendant's counterclaim would be dealt with together.||

ORDER XXXIV.

QUESTIONS OF LAW.

Rule 1.

The parties may, after the writ of summons has been issued, concur in stating the questions of law arising in the action in the form of a special case for the opinion of the Court. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby.

* *Turquand v. Wilson*, 1 Ch. D., 85; 45 L. J. (Ch.), 104; 24 W. R., 56; 1 Charley's Cases (Court), 124. The order for an account in this case might have been made under Order XL., Rule 11, the plaintiff being entitled to it on the admissions of fact in the pleadings.

† 1 Ch. D., 643; 45 L. J. (Ch.), 489; 33 L. T., 803; 24 W. R., 245.

‡ *Gilbert v. Smith*, 2 Ch. D., 686; 45 L. J. (Ch.), 514; 35 L. T., 43; 24 W. R., 568. The present Rule is clearly as applicable to this case as Order XL., Rule 11, though not stated to be so.

§ *Sickles v. Norris*, 2 Charley's Cases (Chambers), 63. Per Archibald, J. || *Rolfe v. Maclaren*, 3 Ch. D., 106; 24 W. R., 816.

Upon the argument of such case the Court and the parties shall be at liberty to refer to the whole contents of such documents, and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial.

Ord. XXIV.,
Rule I.

The Rule is founded, partly on the Common Law Procedure Act, 1852, ss. 46, 47, and 48; partly on Sir George Turner's Act, 13 and 14 Vict. c. 35; and partly on the Reg. Gen. Hil T., 1862.

Special cases on points of law were first allowed to be stated at Common Law by the 3 and 4 Wm. IV. c. 42, s. 25; but only "after issue joined;" the 46th section of the Common Law Procedure Act, 1852, was, as stated by Mr. Archbold,* "an improvement upon this;" "for," he adds, "now the parties may have the special case *without pleadings*, thereby saving the expense to them, as well as any risk of being defeated by their not properly raising the question of law to be decided."

By s. 46 of the Common Law Procedure Act, 1852, it is enacted that "the parties may, *after writ issued*, and before judgment, by consent and order of a Judge, state any question or questions of law in a special case for the opinion of the Court, without any pleadings." The present Rule follows this enactment in requiring that before a special case under the Rule is stated, an action must have been commenced, but no order is necessary.

It is provided by the Reg. Gen. Hil T., 1862, that "every special case set down in any of the Superior Courts of Common Law shall be divided into paragraphs, *which, as nearly as may be, shall be confined to a distinct portion of the subject*, and every paragraph shall be numbered consecutively." The present Rule re-enacts the provisions of that Rule: with the omission of the words in italics, which, however, it would be as well for the draughtsman to pay heed to. By Order XIX., Rule 4, *supra*, it is provided that "every pleading shall contain, as concisely as may be, a statement of the material facts, such statement being divided into paragraphs, numbered consecutively, and *each paragraph containing, as nearly as may be, a separate allegation*."

The rest of the present Rule is copied, almost *verbatim*, from Sir George Turner's Act (13 and 14 Vict. c. 35), s. 1. That Act enabled, however, parties interested in questions cognizable in the Court of Chancery to concur in stating a special case for the opinion of that Court without filing any Bill. The special case was to be filed, nevertheless, "in the same manner as Bills are filed," and defendants might appear to it "in the same manner as defendants appear to Bills."†

In *Lysaght v. Edwards*,‡ which was an action in the Chancery Division for specific performance of an agreement to sell certain freeholds and copyholds, and in *Dixon v. Lowe*,§ which was an action in the same Division for administration of an estate, the parties concurred in stating a special case under the present Rule.

* Archbold's Practice, Part III., chap. II., p. 899.

† 13 and 14 Vict. c. 35, s. 10. Proceedings in error on a special case are abolished by Order LVIII., Rule 1, *infra*. For the new mode of appeal, see Rule 2 of that Order.

‡ 2 Ch. D., 499; 45 L. J. (Ch.), 554; 34 L. T., 787; 24 W. R., 778.

§ 35 L. T., 548.

Rule 2.

If it appear to the Court or a Judge, either from the statement of claim or defence or reply or otherwise, that there is in any action a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried,* or before any reference is made to a Referee or an Arbitrator, the Court or Judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or Judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.

This Rule is a re-enactment of Rule 24 of the Principal Act.

The form of application under this Rule to the Judge at chambers is by summons to the opposite party to *show cause why* the facts of the case should not be stated in the form of a special case for the opinion of the Court.†

The application should be supported by an affidavit of facts, in which the party applying should swear that *there are no facts in dispute*. It is competent for the Master or Judge at chambers to take all the facts of the case into consideration, whether stated upon the pleadings or not. It is too narrow a construction of the present Rule to limit it to something which appears upon the pleadings.‡ The words of the Rule are—“If it appear *either* from the statement of claim or defence or reply, or *otherwise*.”

Under the present Rule, only such questions of law can be raised for the decision of the Court or a Judge as must *necessarily* arise in the action. The Court or Judge has no jurisdiction (even by consent) to make an order under this Rule on a hypothetical special case based on assumed facts, which are not to be finally binding upon the parties.§

Where the legal liability depends upon *disputed facts*, the action must go to a jury. The present Rule does not apply.||

In *The Metropolitan Board of Works v. The New River Company*,¶ the Court of Appeal, affirming, on interlocutory appeal, the decision of the

* Acted on, by analogy, at the trial also. *Poolcy v. Driver*, 5 Ch. D., 460. Per Jessel, M.R.

† Coe's Practice of the Judges' Chambers, 105.

‡ Per Cockburn, C. J., in *The Metropolitan Board of Works v. The New River Company*, 2 Q. B. D., 67; 36 L. J. (Q. B.), 183; 35 L. T., 589; 25 W. R., 175.

§ *The Republic of Bolivia v. The National Bolivian Navigation Company*, 24 W. R., 361; 11 N. C., 39. Per Jessel, M.R.

|| Per Lush, J., 1 Charley's Cases (Chambers), 117; Coe's Practice, 106.

¶ 2 Q. B. D., 67; 36 L. J. (Q. B.), 183; 35 L. T., 589; 25 W. R., 175.

Queen's Bench Division,* decided that a Judge at chambers has power to make an order under this Rule at the instance of the plaintiff, after the defendant's appearance, and before delivery by the plaintiff of a statement of claim.

Ord. XXXIV.,
Rule 2.

"Proceedings may thereupon be stayed." See *Dixon v. Lowe*.† In *Jenney v. Bell*,‡ the defendant, who was the trustee of a composition deed registered under the Bankruptcy Act, 1861, moved, under the present Rule, for a stay of proceedings in an action against him in the Chancery Division by a creditor, who had signed the composition deed, but who, nevertheless, claimed in that Division an account of the balance due to her, and that the defendant might be directed to raise the amount out of the debtor's property. The ground of the motion was that the composition deed (as appeared from the statement of defence) was a complete answer in law to the plaintiff's claim in the Chancery Division, the defendant, under s. 197 of the Bankruptcy Act, 1861, being "subject, in all matters in relation to the estate of the debtor, to the jurisdiction of the Court of Bankruptcy." Malins, V.C., however, refused the motion, on the ground (1) that the deed was invalid in bankruptcy, as it contained provisions not in accordance with s. 192 of the Bankruptcy Act, 1861, and, consequently, was not within s. 197 of that Act; § and (2) that, independently of this, the Chancery Division had concurrent jurisdiction over the subject-matter of the action with the Court of Bankruptcy.||

Rule 3.

Every special case shall be printed by the plaintiff, and signed by the several parties or their solicitors, and shall be filed by the plaintiff. Printed copies for the use of the Judges shall be delivered by the plaintiff.

By the Rules of the Supreme Court (Costs), Order IV., *infra*, it is provided, that the present Rule "shall apply to a special case pursuant to the Act of 13 and 14 Vict. c. 35."

The signature of *Counsel* to a special case is no longer necessary, notwithstanding s. 10 of the 13 & 14 Vict. c. 35. Per Jessel, M.R., in *Hare v. Hare*.¶

Under the Reg. Gen. Hil. T., 1853, Rule 16, the copies of the special case were to be delivered at the Judges' chambers** "four clear days before the day appointed for the argument." It is apprehended that this Rule is still in force. The duty of delivering copies, however, now devolves solely upon the plaintiff: under the Rule just cited this duty devolved upon the plaintiff and the defendant jointly.††

* 1 Q. B. D., 727; 45 L. J. (Q. B.), 759.

† 35 L. T., 548.

‡ 2 Ch. D., 547; 45 L. J. (Ch.), 369; 34 L. T., 485; 24 W. R., 550.

§ *Dell v. King*, 33 L. J. (Ex.), 47; 9 L. T., 976.

|| *Stone v. Thomas*, L. R., 5 Ch. D., 223, 224. But see *Ex parte Ditton*, 1 Ch. D., 557; 45 L. J. (Bank.), 87; 34 L. T., 109; 24 W. R., 289.

¶ W. N., 1876, p. 44. ** *Howells v. Wynne*, 15 C. B. (N. S.), 11.

†† See, further, as to the practice under the present Rule, *Coe's Practice of the Judges' Chambers*, 105, 106.

Ord. XXXIV.,
Rule 4.

Rule 4.

No special case in an action to which a married woman, infant, or person of unsound mind is a party be set down for argument without leave of the Court Judge, the application for which must be supported by sufficient evidence that the statements contained in the special case, so far as the same affect the interest of the married woman, infant, or person of unsound mind, are true.

This Rule is founded on sections 11 and 13 of the 13 and 14 Vict. The words, "the application" down to "true" are copied ~~verbatim~~ s. 11. The Rule, however, differs from the statute in this, the leave may be obtained by *summons at chambers*: the application for leave under the statute must have been made *in Court*.*

Rule 5.

Either party may enter a special case for argument by delivering to the proper officer a memorandum of case in the Form 13 in Schedule (B) hereto, and also if a married woman, infant, or person of unsound mind is a party to the action, producing a copy of the order giving leave to enter the same for argument.

"For argument." Where all parties agree, special cases will be argued before a Divisional Court. (Order LVIIa.)

N.B.—Special cases may still be stated in arbitrations under the Common Law Procedure Act, 1854, ss. 4 and 5; and in interpleader proceedings under the Common Law Procedure Act, 1860, ss. 15 and 16.

ORDER XXXV.

PROCEEDINGS IN DISTRICT REGISTRIES.†

Rule 1.

Where an action proceeds in the District Registry, all proceedings, where by these Rules it is otherwise provided, or the Court or a Judge otherwise order, shall be taken in the District Registry, down to and including the entry for trial of the action or issues therein; or if the plaintiff is a

* *Sidebottom v. Watson*, 1 W. R., 229.

† As to the subject-matter of this Order, see sections 60 to 66, inclusive, of the Principal Act, and the notes thereto; s. 13 of this Act, Orders IV., V., XII., XIII., XIX., and LXI.

to enter final judgment or to obtain an order for an account by reason of the default of the defendant, then down to and including such judgment or order ; and such judgment or order as last aforesaid shall be entered in the District Registry in the proper book, in the same manner as a like judgment or order in an action proceeding in London would be entered in London. Where the writ of summons is issued out of a District Registry and the plaintiff is entitled to enter interlocutory judgment under Order XIII., Rule 6, or where the action proceeds in the District Registry and the plaintiff is entitled to enter interlocutory judgment under Order XXIX., Rule 4 or 5, in either case such interlocutory judgment, and, when damages shall have been assessed, final judgment shall be entered in the District Registry, unless the Court or a Judge shall otherwise order. Where an action proceeds in the District Registry, final judgment shall be entered in the District Registry unless the Judge at the trial or the Court or a Judge shall otherwise order.

**Ord. XXXV.,
Rule 1.**

This Rule was repealed by the 12th of the Rules of the Supreme Court, June, 1876, now forming Rule 1a of this Order.

Rule 1a.

Order XXXV., Rule 1, of the " Rules of the Supreme Court " is hereby annulled, and the following shall stand in lieu thereof:—

Where an action proceeds in the District Registry, all proceedings, except where by any of the Rules of the Supreme Court it is otherwise provided, or the Court or a Judge shall otherwise order, shall be taken in the District Registry, down to and including final judgment, and every final judgment, and every order for an account by reason of the default of the defendant or by consent shall be entered in the District Registry in the proper book, in the same manner as a like judgment or order in an action proceeding in London would be entered in London.

Where the writ of summons is issued out of a District Registry and the plaintiff is entitled to enter interlocutory judgment under Order XIII., Rule 6, or where the action proceeds in the District Registry and the plaintiff is entitled to enter interlocutory judgment under Order XXIX., Rule 4 or 5, in either case such interlocutory judgment, and, when damages shall have been assessed, final judgment shall be

Ord. XXXV., entered in the District Registry, unless the Court or a Judge
Rule 1a shall otherwise order.

Where an action proceeds in the District Registry, final judgment shall be entered in such Registry unless the Judge at the trial or the Court or a Judge shall otherwise order.

Actions in the Queen's Bench, Common Pleas, and Exchequer Divisions shall be entered for trial with the Associates, and not in the District Registries.

This new Rule was added by Rule 12 of the Rules of the Supreme Court, June, 1876.

The alterations are: the substitution of "any of the Rules of the Supreme Court" for "these Rules," in the first paragraph; the omission in the same paragraph of the words "down to and including the entry for trial of the action or issues therein, or, if the plaintiff is entitled to enter final judgment, or to obtain an order for an account by reason of the default of the defendant, then;" the substitution of "down to and including final judgment," for "down to and including such judgment or order;" and the consequential amendment of substituting in the same paragraph the words "and every final judgment, and every order for an account by reason of the default of the defendant, or by consent," for "and such judgment or order as last aforesaid." There is no alteration in the second and third paragraphs of the Rule. A fourth paragraph is added at the end of the Rule: "Actions in the Queen's Bench, Common Pleas, and Exchequer Divisions shall be entered for trial with the Associates, and not in the District Registries." As to the Associates, see Order XXXVI., Rule 23, *infra*.

By Order XIX., Rule 29, *supra*, "where an action proceeds in a District Registry, all pleadings and other documents required to be filed shall be filed in the District Registry." (See the note to that Rule, *supra*.)

The concluding words of the first paragraph of the present Rule, "and every final judgment and every order for an account by reason of the default of the defendant or by consent shall be entered in the District Registry in the proper book in the same manner as a like judgment or order in an action proceeding in London would be entered in London," are framed upon the authority of the legislature as expressed in s. 64 of the Principal Act, *supra*:—"Such proceedings may be recorded in the District Registry in such manner as may be prescribed by Rules of Court." S. 64 also declares that "all such other proceedings in any such action as may be prescribed by Rules of Court shall be taken and may be recorded in the same District Registry." The second and third paragraphs of this Rule are framed with a view to carrying out this authority.

"Interlocutory judgment," i.e., judgment subject to the finding of a jury under a writ of inquiry as to the *quantum* of damages; Order XIII., Rule 6, *supra*, gives power to enter such a judgment in default of appearance. Order XXIX., Rules 4 and 5, *supra*, give power to enter such a judgment in default of pleading. S. 64 of the Principal Act might have been held not to include a case of interlocutory judgment, but a case of final judgment only. Hence this enactment.

A short recapitulation of the practice as to issuing writs out of and appearing in District Registries may here be useful:—

Ord. XXXV.,
Rule 1a.

The plaintiff, wherever resident, may issue a writ of summons out of a District Registry in any action other than a Probate action*—even in an action under the Summary Procedure on Bills of Exchange Act, 1855 (18 and 19 Vict. c. 67), although Order II., Rule 6, says that “the procedure” under that Act, prescribed when District Registries were unknown, “shall continue to be used.”†

Minute directions as to the addresses, which must be indorsed on a writ issued out of a District Registry, will be found in Order IV., Rule 3a, *supra*.

Where the defendant neither resides nor carries on business within the district, the plaintiff must indorse on his writ a notice that the defendant may appear in the District Registry or in London at his option.‡ This indorsement, however, is unnecessary where the action is brought under the Bills of Exchange Act. The form of indorsements given in the Schedule (A) to the Bills of Exchange Act must then be copied, with this qualification, that notice should be given to the defendant that he must apply at the office of the District Registrar instead of at the Judge’s chambers, for *leave to appear*. As the defendant cannot appear at all without leave, it would be idle to tell him that, if leave be given him, he may appear in the District Registry or in London.§

If the defendant resides, or carries on business within the district, the plaintiff must indorse on his writ a notice to the defendant to appear in the District Registry.||

If a sole defendant, or all the defendants, or all the defendants who appear, appear in the District Registry, either in the exercise of the option¶ already mentioned, or because it is imperative,** the action is to proceed in the District Registry,†† subject, nevertheless, to the power of removal to London given to the defendant by the present Order.‡‡

And here it may be useful to note that, when an action is commenced and proceeds in a District Registry, all fees and allowances, and rules, and directions relating to costs, which would have been applicable if the action had been commenced and had proceeded in London, shall apply to the proceedings in the District Registry.§§ (See, further, as to costs, Rule 3 of this Order, *infra*.)

If the defendant, or any defendant, in the exercise of his option||| appears in London, the action is to proceed in London.¶¶ In that event, the

* Order V., Rule 1, *supra*.

† *Oger v. Bradnum*, 1 C. P. D., 334; 45 L. J. (C. P.), 273; 34 L. T., 578; 24 W. R., 404; 1 Charley’s Cases (Court), 132, where the form of the writ will be found.

‡ Order V., Rule 2; Order XII., Rule 3, *supra*.

§ *Oger v. Bradnum*, *ubi supra*.

|| Order V., Rule 3, *supra*.

¶ Order XII., Rule 3, *supra*.

** Order XII., Rule 2, *supra*.

†† Order XII., Rule 4, *supra*.

‡‡ Rules 11, 12, and 13, *infra*.

§§ Rules of the Supreme Court (Costs), Special Allowances and General Provisions, § 34.

||| Order XII., Rule 3, *supra*.

¶¶ Order XII., Rule 5, *supra*.

**Ord. XXXV.,
Rule 1a.**

defendant is, on the same day on which he appears, to give notice in writing of his appearance in London to the plaintiff's solicitor. The notice may either be sent by post to or served at the plaintiff's address for service within the district of the District Registry.*

Where a defendant, who was entitled to the option† already mentioned, fails to appear anywhere, the plaintiff must not sign judgment for want of appearance against him "until such time as a letter posted in London the previous evening, in due time for delivery to him on the following morning, ought to have reached him."‡

An administration action which had been commenced in the Bradford District Registry, was set down for trial before Hall, V.C., to whom it had been assigned. Counsel for the plaintiff submitted the question whether, having regard to the new Rule 1a, *the action ought not to be heard at Bradford* (!) The Vice-Chancellor replied that, notwithstanding the new Rule, the action had been properly set down before him.§

Although the Court has power to direct accounts and inquiries to be taken and made in a District Registry,|| and has also power to appoint a receiver,¶ it has no power to direct the receiver to pass his accounts through the District Registry.**

In an action removed to London, the Court will not direct accounts and inquiries to be taken and made in the District Registry if it would involve needless expense.††

The offices of each District Registry are open on every day, and at every hour in the year on which the offices of the Registrar of the local County Court are open.‡‡

Rule 2.

Subject to the foregoing Rules, where an action proceeds in the District Registry the judgment and all such orders therein as require to be entered, except orders made by the District Registrar under the authority and jurisdiction vested in him under these Rules, shall be entered in London, and an office copy of every judgment and order so entered shall be transmitted to the District Registry to be filed with the proceedings in the action.

The word "Rules" in the present Rule referred to the original Rule 1 of this Order (defining the meaning of the word "district") which

* Order XII., Rule 6a, *supra*.

† Order XII., Rule 3, *supra*.

‡ Order XIII., Rule 5a, *supra*.

§ *In Re Smith, Hutchinson v. Ward*, 36 L. T., 178; 25 W. R., 452; W. N., 1877, p. 67.

|| Section 66 of the Principal Act, *supra*.

¶ Section 25, subs. (8), of the Principal Act, *supra*.

** *Walker v. Robinson*, 34 L. T., 229; 24 W. R., 427.

†† *Ibid*.

‡‡ Order LXI., Rule 4a (Rules of the Supreme Court, December, 1875).

was struck out in Committee in the House of Commons, and the original Rule 2, which now forms [the repealed] Rule 1 of this Order. The word "Rules" should have been altered to the singular number, "Rule."

Ord. XXXV.,
Rule 2.

"The authority vested in him." See Rule 4 of this Order, *infra*.

After judgment has been entered in London under this Rule, an application for the names of the parties who are co-partners in the defendants' firm must be made in London to the Judge at chambers, and not to the District Registrar.*

Rule 3.

Where an action proceeds in the District Registry all writs of execution for enforcing any judgment or order therein shall issue from the District Registry, unless the Court or a Judge shall otherwise direct. Where final judgment is entered in the District Registry costs shall be taxed in such Registry, unless the Court or a Judge shall otherwise order.

"It is only in the simple case where the District Registrar has the power of entering final judgment, *e.g.*, in the case of default being made by the defendant, that the costs can be taxed by the District Registrar." Per Hall, V.C., in *Irlam v. Irlam*.† (This *dictum* was uttered *after* Rule 1a of this Order, *supra*, had been issued.)

Where, in an action commenced in a District Registry, an administration decree made by Hall, V.C., directed accounts and inquiries to be taken and made in the District Registry, and ordered that, upon the result being reported, the action should be heard in London upon further consideration, Hall, V.C., on the case coming on for further consideration, upon the District Registrar's report, refused to allow the costs of the action to be taxed by the District Registrar.‡

Rule 4.

Where an action proceeds in a District Registry the District Registrar may exercise all such authority and jurisdiction in respect of the action as may be exercised by a Judge at chambers, except such as by these Rules a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions is precluded from exercising.

The view of many eminent lawyers§ that the duties of District Registrars should be purely *ministerial* has, it will be seen by this Rule, not been

* *Lynch v. The Overseal Coal Company*, 1 Charley's Cases (Chambers), 59. Per Huddleston, B.

† 2 Ch. D., 608; 24 W. R., 292, 949.

‡ *Irlam v. Irlam*, 2 Ch. D., 608; 24 W. R., 292, 949.

§ See the note to s. 60 of the Principal Act, *supra*.

**Ord. XXXV.,
Rule 4.**

carried out. See, as to the jurisdiction of the Masters of the Queen's Bench, Common Pleas, and Exchequer Divisions, the Judges' Chambers (Despatch of Business) Act, 30 and 31 Vict. c. 68; the Reg. Gen., Mich. T., 1867, made under the authority of that Act; and Order LIV., Rule 2 and 2a, *infra*.

There is no limitation to the jurisdiction of the Chief Clerks at Chancery chambers similar to that of the Masters; they can exercise all the jurisdiction of their Judges at chambers. This jurisdiction is very extensive. See the 15 and 16 Vict. c. 80; 18 and 19 Vict. c. 134, and Order XXXV. of the Consolidated Orders of the Court of Chancery.

The present Rule is explanatory of s. 62 of the Principal Act:—"All District Registrars shall have power to administer oaths, and perform such other duties in respect of any proceedings pending as may be assigned to them by *Rules of Court*."

In addition to the powers conferred upon him by this Rule, a District Registrar may, by section 22 of the Appellate Jurisdiction Act, 1876, from time to time appoint a deputy, but in each case with the approval of the Lord Chancellor, and subject to such regulations as his lordship may from time to time make. The appointment is in no case to be made for a period exceeding three months. The deputy is clothed, during his term of office, with the same authority as the District Registrar.

A District Registrar has no power to issue a judgment summons. Per Quain, J., at chambers.*

A District Registrar has no power to make a decree for administration on an administration summons, or to direct accounts and inquiries to be taken and made. Per Hall, V.C., in *Irlam v. Irlam*.†

Hall, V.C., in a recent case,‡ remarked that he had lately observed that District Registrars had been in the habit of making orders on their own responsibility, appointing receivers, and directing banking accounts to be opened, and money to be paid in to such accounts. He desired it, however, to be known, that these proceedings were highly irregular, and that in any case which might come before him, he would hold such orders to be void. All moneys paid in to any account in pursuance of an order of a District Registrar were so paid at the *personal risk* of everybody concerned in the transaction, including the District Registrar himself. Not only have District Registrars no power to order accounts to be taken,§ but if the Judge directs that accounts shall be taken in an action commenced in a District Registry, the District Registrar is not to take the account, unless the judgment specially directs him to do so.

Unless under special circumstances, the Court will not make an order in an administration action commenced in a District Registry that the sale of the testator's real estate shall be conducted in the District Registry. It is a matter of general convenience that the Judge should be accessible in reference to settling conditions and other points which frequently arise in carrying out a sale. Per Hall, V.C., in *McDonald v. Foster*.||

* 1 Charley's Cases (Chambers), 118.

† 2 Ch. D., 608; 24 W. R., 292, 949.

‡ *In Re Smith, Hutchinson v. Ward*, 36 L. T., 178; 25 W. R., 452; W. N., 1877, p. 67.

§ *Irlam v. Irlam*, 2 Ch. D., 608; 24 W. R., 292, 949.

|| W. N., 1877, p. 121; 12 N. C., 105. Affirmed on appeal, 25 W. R., 687; 12 N. C., 122; but only as being a matter purely within the Judge's discretion.

Rule 5.

Every application to a District Registrar shall be made in the same manner in which applications at chambers are directed to be made by these Rules.

This Rule refers to Order LIV., Rule 1, *infra*:—"Every application at chambers, authorised by these Rules, shall be made in a summary way by summons."

Rule 6.

If any matter appears to the District Registrar proper for the decision of a Judge, the Registrar may refer the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the Registrar, with such directions as he may think fit.

This Rule reappears as Order LIV., Rule 3, *infra*, with the substitution of "Master" for "District Registrar." The Rule is taken from Reg. Gen., Mich. T., 1867, where the Rule applies to the Master.

To enable a District Registrar to refer any matter to a Judge, a summons must previously have been issued to the other side to appear before the District Registrar. Per Quain, J., at chambers.*

Rule 7.

Any person affected by any order or decision of a District Registrar may appeal to a Judge. Such appeal may be made notwithstanding that the order or decision was in respect of a proceeding or matter as to which the District Registrar had jurisdiction only by consent. Such appeal shall be by summons within four days after the decision complained of, or such further time as may be allowed by a Judge or the Registrar.

This Rule reappears as Order LIV., Rule 4, *infra*, with the substitution of "Master" for "District Registrar."

The Rule is taken from Reg. Gen., Mich. T., 1867, where it applies to the Master.

Apparently by an oversight, there is no appeal from a *Master* in matters over which he has jurisdiction only by consent. Per Quain, J., at chambers.†

* 1 Charley's Cases (Chambers), 118.

† *Ibid.*, 119.

Ord. XXXV.,
Rule 8.

Rule 8.

An appeal from a District Registrar shall be no stay of proceedings unless so ordered by a Judge or the Registrar.

The Rule reappears as Order LIV., Rule 5, *infra*, with the substitution of "Master's decision" for "District Registrar," and "Master" for "Registrar."

It is taken from Reg. Gen., Mich. T., 1867, where it applies to an appeal from the Master's decision.

Rule 9.

Every District Registrar and other officer of a District Registry shall be subject to the orders and directions of the Court or a Judge as fully as any other officer of the Court, and every proceeding in a District Registry shall be subject to the control of the Court or a Judge, as fully as a like proceeding in London.

See as to the position of existing officers of the Superior Courts, s. 77 of the Principal Act, *supra*; as to that of future officers, s. 84 of the same Act.

Rule 10.

Every reference to a Judge by or appeal to a Judge from a District Registrar in any action in the Chancery Division shall be to the Judge to whom the action is assigned.

This Rule follows the practice of the Court of Chancery. The practice in the Courts of Common Law is regulated by the Statute 1 and 2 Vict. c. 45, which enables a Judge of any one of the three Common Law Courts to transact out of Court any business relating to any other of the Common Law Courts in the same manner as if he had been a Judge of the Court to which the business belonged, and this, although such Courts might have no common jurisdiction therein.

Rule 11.

In any action which would, under the foregoing Rules, proceed in the District Registry, any defendant may remove the action from the District Registry as of right in the cases, and within the times, following :—

Where the writ is specially indorsed under Order **Ord. XXXV., Rule 11.** III., Rule 6, and the plaintiff does not within four days after the appearance of such defendant give notice of an application for an order against him under Order XIV.; then such defendant may remove the action as of right at any time after the expiration of such four days, and before delivering a defence, and before the expiration of the time for doing so :

Where the writ is specially indorsed, and the plaintiff has made such application as in the last paragraph mentioned, and the defendant has obtained leave to defend in manner provided by Order XIV.; then such defendant may remove the action as of right at any time after the order giving him leave to defend, and before delivering a defence, and before the expiration of the time for doing so :

Where the writ is not specially indorsed any defendant may remove the action as of right at any time after appearance, and before delivering a defence, and before the expiration of the time for doing so.

Mr. Gorst, Q.C., moved the omission of this and the next Rule, as destroying the privileges conceded by the other Rules of the Schedule to District Registries, and interfering with the vested rights of the suitors of the County Palatine of Lancaster.* A division was called for, but the motion was negatived.

There can be no doubt that these two Rules concede to defendants large powers of removal of actions from District Registries to London ; but this, while militating against actions "proceeding" in the District Registries, increases the elasticity of the new procedure generally.

Where the writ is specially endorsed, the process against the defendant is more peremptory than where the writ is not specially endorsed. The defendant on appearance may be called upon by the plaintiff to show cause why the plaintiff should not sign final judgment. By the first subsection of this Rule, if the plaintiff neglects to avail himself of this privilege for four days after the defendant's appearance, the defendant may as of right remove the action at the expiration of that period. The plaintiff may, however, avail himself of the privilege of calling upon the defendant to show cause, and the Judge may order that the defendant shall have

* The writer, as a Lancashire member, supported the motion.

**Ord. XXXV.,
Rule 11.**

leave to defend. In this case it is provided by the second subsection of this Rule that the defendant may remove the action, as of right, at any time after the order giving him leave to defend has been made by the Judge. "Such application as in the last paragraph mentioned" does not seem necessarily to mean an application within four days.

In the case of a writ not specially endorsed, the defendant's right to remove the action arises immediately on his entering an appearance, he need not wait four days, and he does not want any order for leave to defend.

It will be remembered that if the defendant neither resides nor carries on business within the district in which the action is commenced, he need not even enter an appearance within the district unless he likes. It is only when the defendant either resides or carries on business within the district that he is *bound* to appear there. See Order V., Rules 1, 2 and 3, and Order XII., Rules 2 and 3, *supra*.

Rule 11a.

In an Admiralty action *in rem* any person who may have duly intervened and appeared may remove an action from a District Registry as of right.

This new Rule was added by Rule 10 of the Rules of the Supreme Court, December, 1875. See Order XII., Rule 17, *supra*.

Rule 12.

Any defendant desirous to remove an action as of right under Rule [11] may do so by serving upon the other parties to the action, and delivering to the District Registrar, a notice, signed by himself or his solicitor, to the effect that he desires the action to be removed to London, and the action shall be removed accordingly: Provided, that if the Court or a Judge shall be satisfied that the defendant giving such notice is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such Court or Judge may order that the action may proceed in the District Registry notwithstanding such notice.

The process provided in cases where the defendant removes the action as of right is exceedingly simple.

As to the proviso at the end of the Rule, see Order XII., Rule 5, *supra*. An application on the part of the plaintiff by summons at chambers would appear to be necessary to obtaining an order that the action shall proceed in the District Registry.

The defendants, a railway company, in an action commenced in a District Registry, having obtained from the District Registrar an order for an enlargement of time for delivering a statement of defence, obtained, while that order was running, another order for further time from a Master in London. Denman, J., at chambers, allowed the order of the Master to stand; and directed the action to be removed to London; but to mark his sense of the omission, on the part of the defendant company, to give notice to the plaintiff under the present Rule, visited the defendant company with the costs of all the proceedings in the District Registry after writ, as well as with the costs of the application to the Master, and of the appeal to himself.*

Ord. XXXV.,
Rule 12.

Rule 13.

In any case not provided for by the last two preceding Rules, any party to an action proceeding in a District Registry may apply to the Court or a Judge, or to the District Registrar, for an order to remove the action from the District Registry to London; and such Court, Judge, or Registrar may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall seem just. Any party to an action proceeding in London may apply to the Court or a Judge for an order to remove the action from London to any District Registry, and such Court or Judge may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall seem just.

The Provincial Law Societies endeavoured to get the two preceding Rules omitted, and also the words, "in any case not provided for by the last two preceding Rules," at the commencement of this Rule, omitted also. It would then have been necessary for a defendant, desirous of removing an action from a District Registry, to apply *in all cases* for an order to remove it. The Government, however, adhered to the two preceding Rules and to the words at the commencement of this Rule, and the motion to omit them was not pressed to a division.

The second clause of this Rule was a concession to the Provincial Law Societies.

The Rule, like s. 65 of the Principal Act, *supra*, empowers "any party" (*e.g.*, a third party), and at any time to apply. Unlike s. 65, it empowers a party to apply to the District Registrar.

In *Walker v. Robinson*,† Bacon, V.C., made an order under the present Rule for the removal to London of an action, in which the plaintiff had, by the defendant's default, become entitled to set the action down on motion for judgment, the record and writ clerks having expressed a doubt

* 2 Charley's Cases (Chambers), 17.

† 34 L. T., 229; 24 W. R., 137; 1 Charley's Cases (Court), 127.

Ord. XXXV., as to whether they could put the action in the Vice-Chancellor's paper, as
Rule 13. it had been commenced in a District Registry.

In *The Birmingham Waste Company, Limited, v. Lane*,* which was a precisely similar case, Hall, V.C., declined to make an order under the present Rule for the removal of the action to London, but directed the documents in the action to be sent up to London for the hearing. Upon that being done, the record and writ clerks (who had got over their scruples) would put the action in his lordship's paper without any further direction from him.

In *Lumb v. Whiteley*,† which was a precisely similar case, but it arose a year later than the two preceding cases, Hall, V.C., declined to direct the documents in the action to be sent up to London for the hearing. It was his lordship's impression that the motion was unnecessary, and that upon application to the District Registrar the action would be set down in the District Registry for hearing in London, and upon that the papers would be sent up to London for the hearing without further order. His lordship accordingly directed the action to be set down in the District Registry on motion for judgment in London.

Rule 14.

Whenever any proceedings are removed from the District Registry to London, the District Registrar shall transmit to the proper officer of the High Court of Justice all original documents (if any) filed in the District Registry, and a copy of all entries in the books of the District Registry of the proceedings in the action.

See *The Birmingham Waste Company, Limited, v. Lane*,* and *Lumb v. Whiteley*,† cited under Rule 13, *supra*. See also section 65 of the Principal Act, *supra*.

Rule 15.

Every District Registrar shall account for and pay over to the Treasury all moneys paid into Court at the Registry of which he is Registrar, in such manner and at such times as may be from time to time directed by the Treasury.

This new Rule was added by the Rules of the Supreme Court, December, 1875.

As to payment into Court, see Order XXX., *supra*, and (as to the Chancery Division) the Chancery Funds Act, 1872, and the Orders and Rules framed under it in 1874.

* 24 W. R., 292; W. N., 1876, p. 292.

† W. N., 1877, p. 40.

ORDER XXXVI.

Ord. XXXVI.
Rule 1.

TRIAL.

Rule 1.

There shall be no local venue for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he shall in his statement of claim name the county or place in which he proposes that the action shall be tried, and the action shall, unless a Judge otherwise orders, be tried in the county or place so named. Where no place of trial is named in the statement of claim, the place of trial shall, unless a Judge otherwise orders, be the county of Middlesex. Any order of a Judge, as to such place of trial, may be discharged or varied by a Divisional Court of the High Court.

This Rule is a re-enactment of Rule 28 of the Principal Act.

The venue is local when the cause of action stated in the declaration could, by possibility, and in its nature, have reference to a particular locality only.*

The venue of all actions will henceforth be *transitory*. The learning on the subject of "venue" will be found in the notes to *Mostyn v. Fabrigas*, in 1 Smith's Leading Cases, 623.

"He shall in his statement of claim." If the plaintiff neglects to avail himself of this power, the Court will not afterwards, on motion, order the action to be tried "elsewhere than in Middlesex."†

"Unless a Judge otherwise orders." The Judicature Commissioners, in their First Report,‡ recommended that "all local venues in civil actions should be abolished, leaving it to the Court or a Judge to control the choice of the plaintiff, in case an inconvenient venue should be chosen."

"Order of a Judge." By Reg. Gen. Hil. T., 1853, Rule 18, "no venue shall be changed without a special order of the Court or a Judge, unless by the consent of the parties."

Actions at law, arising out of charges on real estate, were, under the old system of procedure, local. An action for arrears of a rent-charge on land in Australia, commenced before the 1st of November, 1875, cannot, therefore, be tried in England. *Semble*, that if the action had been commenced after the 1st of November, 1875, it might have been so tried, local venue being abolished by the present Rule.§

Where, in an action for not supplying milk, the defendants swore that

* Broom's Comm., p. 164, 4th edn.

† *Ridge v. Ridge*, 25 L. T., 528.

‡ Page 17.

§ *Whitaker, Executrix, v. Forbes*, 1 C. P. D., 51; 45 L. J. (C.P.), 140; 33 L. T., 582; 24 W. R., 241; 1 Charley's Cases (Court), 128. (In the Court of Appeal.)

Ord. XXXVI., Rule 1. they resided in Wiltshire, that the cause of action arose there, and that evidence of local custom would be required, Quain, J., at chambers, refused to change the venue from Middlesex to Wiltshire, on the ground that it would cause delay.*

The power conferred on a plaintiff by the present Rule of fixing the place of trial by his statement of claim, applies to Chancery suits. In *Redmayne v. Vaughan*,† in which this was so decided, Bacon, V.C., ordered a Chancery suit to be tried at the Liverpool Assizes, in accordance with the plaintiff's desire, as expressed in his statement of claim. The reason why an application for leave was made in this case, was that the District Registrar and Associate at Liverpool had each declined to enter the action for trial at the Assizes there. It will be seen that under the present Rule no application for leave is necessary.

To oust the plaintiff's right of fixing the place of trial, the defendant must show a preponderance of convenience in having the action tried elsewhere.‡

See Rules 29 and 29a, and the notes thereto, as to the power of a Judge to send an action to be tried in London, or Middlesex, or at the Assizes.

Rule 2.

Actions shall be tried and heard either before a Judge or Judges, or before a Judge sitting with assessors, or before a Judge and Jury, or before an Official or Special Referee, with or without assessors.

This Rule is a re-enactment of Rule 30 of the Principal Act.

As to the Official and Special Referees, see sections 57, 58, and 59 of the Principal Act, *supra*, and Rules 30 to 34 of this Order, *infra*.

As to trial before a Judge sitting *alone*, see section 1 of the Common Law Procedure Act, 1854. As to trial before a Judge sitting with *Assessors*, see section 56 of the Principal Act, *supra*.

The Judicature Commissioners § recommended that any question to be tried should be capable of being tried by a Judge, a Jury, or a Referee.

When the plaintiff has made his election of one of the modes of trial specified in this Rule, he is bound by his election.||

Rule 3.

Subject to the provisions of the following Rules, the plaintiff may, with his reply, or at any time after the close of the pleadings, give notice of trial of the action, and thereby specify one of the modes mentioned in Rule 2 ;

* 1 Charley's Cases (Chambers), 119.

† 24 W. R., 983; 11 N. C., 163.

‡ *Plum v. The Normanton Iron and Steam Company, Limited*, 2 Charley's Cases (Chambers), 64. Per Denman, J. § First Report, p. 13.

¶ *Lascelles v. Butt*, 2 Ch. D., 588; 35 L. T., 122; W. N., 1876, p. 135 (Bacon, V.C.); 24 W. R., 659 (on appeal).

and the defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a Court or Judge may allow, to the effect that he desires to have the issues of fact tried before a Judge and Jury, be entitled to have the same so tried. Ord. XXXVI.,
Rule 3.

The Judicature Commissioners* recommended that the plaintiff should be at liberty to give notice of trial by any one of the modes of trial specified in Rule 2, which he may prefer, subject to the right of the defendant to move the Judge to appoint any other mode. This recommendation is carried out in the present Rule, and its principle only partly, *e converso*, in the next.

"Subject to the provisions of the following Rules." These words are very important, for they except from the operations of this Rule cases falling under Rule 26 of this Order, *infra*.†

The present Rule, coupled with section 22 of the Principal Act, gives the defendant a STATUTORY RIGHT‡ TO A TRIAL BEFORE A JUDGE AND JURY, qualified only by the discretion given to the Court of directing a trial without a jury in cases falling under Rule 26 of the present Order.§

In *Sugg v. Silber*, || which was an action for the infringement of a patent for improvements in gas-burners, notice of trial by jury was given by the plaintiff under the old practice before the 1st of November, 1875. Archibald, J., however, at chambers, made an order, on the 27th of January, 1876, at the instance of the plaintiff, for the trial of the action "before a Judge sitting with assessors," under Rule 2 of this Order, *supra*; and varied the notice previously given by making it a notice of trial, under the present Rule, "before a Judge sitting with assessors, one of the modes mentioned in Rule 2." "Within four days from the time of the service of the notice of trial" (*i.e.*, on Jan. 31st), the defendant, pursuant to the provisions of the present Rule, gave "notice to the effect that he desired to have the issues of fact tried before a Judge and jury." On the 7th of March, 1876, the plaintiff served a summons on the defendant to attend at chambers to have assessors nominated, in pursuance of the Judge's order of the 27th of January. At the hearing of the summons (on the 10th of March), the

* First Report, p. 13.

† *Pilley v. Baylis*, 5 Ch. D., 241; 36 L. T., 296; W. N., 1877, p. 64; *West v. White*, 4 Ch. D., 631; 46 L. J. (Ch.), 333; 25 W. R., 342; 36 L. T., 95.

‡ Per Bacon, V.C., in *West v. White*, 4 Ch. D., 631; 46 L. J. (Ch.), 333; 25 W. R., 342; 36 L. T., 95.

§ *Sugg v. Silber*, 1 Q. B. D., 362; 45 L. J. (Q. B.), 460; 34 L. T., 582; 24 W. R., 640; *Clarke v. Cookson*, 2 Ch. D., 746; 45 L. J. (Ch.), 752; 34 L. T., 746; 24 W. R., 535; *Pilley v. Baylis*, 5 Ch. D., 241; 36 L. T., 296; W. N., 1877, p. 64; *Sykes v. Firth*, W. N., 1877, p. 38; 12 N. C., 95; *Back v. Hay*, 5 Ch. D., 235; 36 L. T., 295; 25 W. R., 392; *Bordier v. Russell*, 5 Ch. D., 514; 12 N. C., 103; *Swindell v. The Birmingham Syndicate*, 3 Ch. D., 127; 45 L. J. (Ch.), 756; 35 L. T., 111; 24 W. R., 911.

|| 1 Q. B. D., 362; 45 L. J. (Q. B.), 460; 34 L. T., 582; 24 W. R., 640.

Ord. XXXVI., Rule 8. defendant insisted on his right to have the action tried "before a Judge and jury," and Archibald, J., referred the question to the Court. On the 10th of April, 1876, the Queen's Bench Division, with many expressions of regret, decided that, under the present Rule, the defendant had an absolute right to have the action tried "before a Judge and jury." On the 16th of May the trial of the action commenced at Nisi Prius, before Mr. Justice Blackburn and a special jury, and lasted six days. Under the direction of the learned Judge, the jury found a verdict for the plaintiff. Counsel for the defendant moved for, and obtained a rule nisi for a new trial, on the ground of misdirection in not adequately explaining to the jury the question of novelty; but the Court refused a rule nisi for a new trial for misdirection on the question whether there was evidence of any infringement. The defendant appealed to the Court of Appeal, which, at the hearing of the appeal, on the 31st of May, 1876, said that he had made out a case for a rule nisi on the question of infringement, but ordered the rule to stand over until the point on which a rule nisi had been granted by the Queen's Bench Division had been decided. The argument of the rule nisi began on the 13th of June, 1876, and continued for several days. On June 26th the Queen's Bench Division gave judgment to set aside the verdict, and enter judgment for the defendant.* Oddly enough, the author of the 22nd section of this Act was Counsel for the plaintiff.

When the plaintiff has made his selection of one of the modes of trial specified in Rule 2, and given notice of trial in that mode, he will not be allowed afterwards to give notice of trial in any other mode. So held by Bacon, V.C., in *Lascelles v. Butt*;† and the Court of Appeal‡ refused to interfere with the Vice-Chancellor's decision.

Rule 4.

Subject to the provisions of the following Rules, if the plaintiff does not within six weeks after the close of the pleadings,§ or within such extended time as a Court or Judge may allow,|| give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, and thereby specify one of the modes mentioned in Rule 2; and in such case the plaintiff [may¶], on giving notice within the time fixed by Rule 3 that he desires to have the issues of fact tried before a Judge and Jury, be entitled to have the same so tried.

* *Sugg v. Silber*, 1 Q. B. D., 362; 45 L. J. (Q. B.), 460; 34 L. T., 582; 24 W. R., 640; *Times*, Tuesday, April 12th, 1876; Thursday, May 18th, 1876; Tuesday, May 30th, 1876; Thursday, June 1st, 1876; Wednesday, June 14th, 1876; and Tuesday, June 27th, 1876.

† 2 Ch. D., 598; 35 L. T., 122. ‡ 24 W. R., 659.

§ See Order XXV. and Order XXIX., Rule 13.

|| See Order LVII., Rule 6, *infra*.

¶ This word is needed to fill out the sense. See Rule 3 of this Order *supra*.

Under Rule 4a, the defendant, instead of giving notice of trial, may apply to the Court or a Judge to dismiss the action for want of prosecution. Ord. XXXVI., Rule 4.

Subject to the provisions of the following Rules." These words are important as excepting from the operation of this Rule cases falling under Rule 26 of this Order, *infra*.

This Rule takes the converse case of a defendant giving notice of trial, in which case the plaintiff has the right of *insisting on trial by jury*, if the defendant in his notice of trial specifies trial by a Judge or a Referee; but the plaintiff is subject to the same exercise by the Judge of his powers under Rule 26 of the present Order, *infra*, as in the case of a defendant insisting, under Rule 3 of this Order, *supra*, on trial by jury.*

The defendant may give notice of trial." This proceeding somewhat resembles that of *trial by proviso*, under the old practice. In all cases in which after issue joined the plaintiff made default in proceeding to trial, by the practice of the Court, he ought to have so proceeded, the defendant might have had the action tried by proviso; that is to say, he might give the plaintiff notice of trial, make up the Nisi Prius Record, carry it down, and enter it and proceed to trial, as if he were proceeding as plaintiff, and thus keep the cause from hanging over his head for an indefinite time; but this mode of trial was very seldom adopted, as the method of giving the plaintiff twenty days' notice to bring the cause on for trial and giving judgment for his costs in case the plaintiff neglected to give notice of trial for the next sittings or assizes,† was generally preferred.

Where the plaintiff makes default in delivering a reply, notice of trial cannot be given under this Rule by the defendant till six weeks from the time at which the plaintiff was in default ‡ have expired.§

Rule 4a.

The defendant, instead of giving notice of trial, may apply to the Court or Judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or a Judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the Court or Judge may seem just.||

This new Rule was added by the Rules of the Supreme Court, June, 1876.

* *Sugg v. Silber*, 1 Q. B., 362; 45 L. J. (Q. B.), 460; 34 L. T., 582; 24 W. R., 640; *Clarke v. Cookson*, 2 Ch. D., 746; 45 L. J. (Ch.), 752; 34 L. T., 646; 24 W. R., 535.

† Common Law Procedure Act, 1852, section 101. Trial by proviso is expressly preserved by section 166 of the same Act.

‡ See Order XXIX., Rule 13, *supra*.

§ See *Litton v. Litton*, 3 Ch. D., 793; 24 W. R., 962.

|| The other cases in which a defendant may apply under these Rules to dismiss an action for want of prosecution are—(1) on plaintiff's making default in delivering a statement of claim (Order XXIX., Rule 1), and (2) on plaintiff's failing to comply with an order to answer interrogatories, or for discovery or inspection (Order XXXI., Rule 20).

616 SUPREME COURT OF JUDICATURE ACT, 1875.

Ord. XXXVI., Where the plaintiff makes default in delivering a reply, the defendant
Rule 4a. cannot move under the present Rule to dismiss the action for want of prosecution, till the time within which the plaintiff must give notice of trial under Rule 4 of this Order, *supra*, has expired.*

Rule 5.

In any case in which neither the plaintiff nor defendant has given notice under the preceding Rules that he desires to have the issues of fact tried before a Judge and Jury, or in any case within the 57th section of the Act, if the plaintiff or defendant desires to have the action tried in any other mode than that specified in the notice of trial, he shall apply to the Court or a Judge for an order to that effect, within four days from the time of the service of the notice of trial, or within such extended time as a Court or Judge may allow.

"The preceding Rules," i.e., Rules 3 and 4 of this Order, *supra*.

"The 57th section of the Act" is the section of the Principal Act, *supra*, which gives power to the Court or a Judge to direct trials to take place before Referees.

Where the plaintiff, on the 9th of December, 1876, gave notice of trial "before a Judge and jury," of a Chancery suit to ascertain boundaries, commenced under the old practice, and continued under the new, but proposed, on the 8th of February, 1877, that the trial should be before one of the Official Referees, who had only then been for the first time appointed, the case was treated as one falling under the present Rule, neither party, in effect, having demanded a jury trial, and Bacon, V.C., decided that the proposal to refer the action to an Official Referee came too late.†

Rule 6.

Subject to the provisions of the preceding Rules, the Court or a Judge may, in any action at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials, and in all cases may order that one or more issues of fact be tried before any other or others.

This Rule is a re-enactment of Rule 32 of the Principal Act, with the

* *Litton v. Litton*, 3 Ch. D., 793; 24 W. R., 962.

† *Lascelles v. Butt*, 2 Ch. D., 588; 35 L. T., 122; 24 W. R., 659.

addition at the commencement of the words, "subject to the provisions of Ord. XXXVI., the preceding Rules," and at the end, of the words, "and in all cases may order that one or more issues of fact be tried before any other or others. **Rule 6.**

"Subject to the provisions of the preceding Rules." These words are very important, for they restrict the powers of the Judge to fix the mode of trial to cases falling within section 57 of the Principal Act, *supra*, or Rule 26 of the present Order, *infra*.

"At any time or from time to time" would seem to include the case of a Judge at Nisi Prius making the order, but see *Robson v. Lees*.*

"One or more issues of fact." The term "*the issue*" at a trial at Common Law is a compound one, and comprehends all the pleadings. There can, of course, be only one such issue. The "issues of fact" referred to in this Rule mean the issues of fact joined in the pleadings, of which issues there may be, of course, many.

As to questions of law, see Order XXXIV., *supra*.

In an action for libel, to which the defendants pleaded "not guilty" and a justification, a summons, calling upon the plaintiff to show cause why all further proceedings under a commission to take evidence abroad should not be stayed till after the trial of the issues arising upon the above pleas, was dismissed by Lush, J., at chambers.†

In an action for injuries done to a vessel of the plaintiffs, while in the dock of the defendants, it was ordered by Lush, J., at chambers, affirming the Master's order, that the question of liability should be tried separately from the question of damages, as the latter question would be certain to be referred at the trial.‡

Rule 7.

Every trial of any question or issue of fact by a jury shall be held before a single Judge,§ unless such trial be specially ordered to be held before two or more Judges.

This Rule is a re-enactment of Rule 33 of the Principal Act.

See the saving of the prior powers of a single Judge in section 39 the Principal Act, *supra*.

"Specially ordered," as in the case of *a trial at bar*. (The Rule cannot be meant, however, to exclude the right of the Attorney-General to demand a trial at bar in cases in which the Crown is interested.)

Rule 8.

Notice of trial shall state whether it is for the trial of the action or of issues therein; and in actions in the Queen's Bench, Common Pleas, and Exchequer

* 6 H. and N., 258.

† *Milissich v. Lloyds*, 1 Charley's Cases (Chambers), 119.

‡ *Liverpool, Brazil, and River Plate Steam Navigation Company v. The St. Katherine Steam Navigation Company*, 1 Charley's Cases (Chambers), 121.

§ As to the decision of "*all business*" in an action by a single Judge, see section 17 of the Appellate Jurisdiction Act, 1876, *infra*.

Ord. XXXVI., Rule 8. Divisions, the place and day for which it is entered for trial. It may be in the Form No. 14 in Appendix (B), with such variations as circumstances may require.

By Rule 8a this Rule is to be read as if the words "to be" were inserted before the words "entered for trial." This alteration was rendered necessary to bring this Rule into harmony with Rule 10 of this Order, *infra*.

No particular form of notice of trial has hitherto been necessary. *Ginger v. Pyecroft*.^{*} It must be in writing. Order LVI., Rule 1.

On comparing the new form in Appendix (B), No. 14, *infra*, with the old ones in Chitty's Forms (Book III., chap. IX.), the first thing that is likely to strike the reader is the addition of the words "*by a Judge and jury*," which, of course, under the old practice would have been mere surplusage; but which are necessary now under Rules 3 and 4 of this Order, *supra*. The next thing that is likely to strike the reader is that "in Middlesex" is substituted for the long description of "for the sittings within [or for the sittings after] this present term, to be holden at Westminster Hall, in the county of Middlesex." By s. 26 of the Principal Act, *supra*, the division of the legal year into terms is abolished, so far as relates to the administration of justice; and the Judges have power to sit and act at any time and in any place, and by Rule 11 of this Order "notice of trial for Middlesex shall not be for any particular sittings." Hence the shortening referred to of the form of notice as to time and place. The words "for the day of — next," are, however, added. This is pursuant to the provision of the present Rule, that in actions in the three Common Law Divisions, "the place and day," for which the cause is entered, are to be stated in the notice of trial. By Rule 12 of this Order, *infra*, notice of trial elsewhere than in London or Middlesex shall be deemed to be for the *first day* of the then next Assizes at the place for which notice of trial is given. The form formerly in use as to notice of trial at Assizes will still, it is apprehended, *mutatis mutandis*, be applicable.† It will be necessary, however, to specify *the mode* of trial in addition to the particulars now given.

The present Rule provides that "the notice of trial shall state whether it is for the trial of the action or of issues therein." This was necessary under the old practice, where the defendant had suffered judgment by default for want of a plea as to part or where there were issues both of law and fact,‡ and it is apprehended that where the jury, who try the issues joined, are also to assess the damages upon a judgment by default, it will still be necessary to specify that they will do so; the Form No. 14 in Appendix (B) hereto may, by the express terms of the present Rule, be varied, *as circumstances may require*.

Rule 8a.

Order XXXVI., Rule 8, of the Rules of the Supreme Court, shall be read as if the words "to be" had been inserted before the words "entered for trial."

^{*} 11 L. J. (Q.B.), 182.

† See Chitty's Forms, p. 136.

‡ *Id.*

This new Rule is added by Rule 12 of the Rules of the Supreme Court, December, 1875. The alteration effected by it was necessary to bring Rule 8 into harmony with Rule 10 of this Order, *infra*. **Ord. XXXVI, Rule 8a.**

Rule 9.

Ten days' notice of trial shall be given, unless the party to whom it is given has consented to take short notice of trial; and shall be sufficient in all cases, unless otherwise ordered by the Court or a Judge. Short notice of trial shall be four days' notice.

The first clause of this Rule is copied from section 97 of the Common Law Procedure Act, 1852.

By Rule 35 of the Reg. Gen., Hil. T., 1853, the expression, "short notice of trial," shall in all cases be taken to mean four days.* The defendant is not bound to accept "short notice of trial" unless a Judge has ordered him to accept it. If the order binds him to take short notice for a particular sittings, it does not bind him to take short notice for any other sittings.†

Two days' notice only of motion is required. Order LIII., Rule 4.

Rule 10.

Notice of trial shall be given before entering the action for trial.

This Rule alters the previous law. It was no objection to a notice of trial under the former practice, that it was given after the cause had been entered for trial.‡

As to notice of, and entry for, trial in District Registries, see Order XXXV., *supra*.

Notice of trial must not be given merely to keep the cause on the list.§

Rule 10a.

Unless within six days after notice of trial is given the cause shall be entered for trial by one party or the other, the notice of trial shall be no longer in force. This Rule is not to apply in any case in which notice of trial has been already given, or to trials not in London or Middlesex.

This new Rule was added by Rule 13 of the Rules of the Supreme Court, December, 1875. See Rule 14 of this Order, *infra*.

* See *Flowers v. Welch*, 9 Ex., 272.

† *Slatter v. Painter*, 1 Dowl., N. S., 35; *Abbot v. Abbot*, 7 Taunt., 452; *White v. Clarke*, 8 Dowl., 730.

‡ *Ginger v. Pyecroft*, 17 L. J. (Q.B.), 182.

§ 1 Charley's Cases (Chambers), 122. Per Lush, J.

Ord. XXXVI.,
Rule 11.

Rule 11.

Notice of trial for London or Middlesex shall not be or operate as for any particular sittings, but shall be deemed to be for any day after the expiration of the notice on which the action may come on for trial in its order upon the list.

By section 30 of the Principal Act, *supra*, sittings in London and Middlesex shall, so far as is reasonably practicable, be *held continuously* throughout the year. There would therefore, if this enactment had been carried out, have been no "*particular sittings*" in London and Middlesex at all. It has been decided, however, that sittings for London and Middlesex shall not be held contemporaneously.

Rule 12.

Notice of trial elsewhere than in London or Middlesex shall be deemed to be for the first day of the then next Assizes at the place for which notice of trial is given.

The form given in Chitty's "Forms"* of notice of trial at the Assizes is "for the next Assizes." In country causes, however, under section 101 of the Common Law Procedure Act, 1852, the plaintiff was to be deemed to be "in default" if issue was joined in, or in the vacation before, one of the issuable terms,† unless he brought the case on to be tried at the *second* Assizes after that term. If issue was joined in, or in the vacation before, one of the other terms, he was in default unless he tried at the next Assizes after that term.‡ See further, as to Assizes and Circuits, section 29 of the Principal Act, and section 23 of this Act, *supra*.

Rule 13.

No notice of trial shall be countermanded, except by consent, or by leave of the Court or a Judge, which leave may be given subject to such terms as to costs or otherwise, as may be just.

This Rule alters the previously existing practice on this subject. A *plaintiff*, previously, had the right of countermanding his notice of trial, even in the case of a trial at bar.§ This was hardly fair to defendants.

As to the former practice, see section 98 of the Common Law Procedure Act, 1852, and Reg. Gen., Hil. T., 1853, Rules 34 and 37.

In an action which raised a question as to the condition of a cargo of rye, the notice of trial was postponed by Lush, J., at chambers, to enable a sailor who was a necessary witness for the plaintiff to be present, the

* Page 136. † Hilary and Trinity.

‡ See 1 Lush's Practice, p. 493.

§ Archbold's Practice, p. 317.

notice having been previously postponed at the instance of the defendant, and the witness having been prevented thereby from being present.* **Ord. XXXVI., Rule 13.**

Rule 14.

If the party giving notice of trial for London or Middlesex omits to enter the cause for trial on the day or day after giving notice of trial, the party to whom notice has been given may, unless the notice has been countermanded under the last Rule, within four days enter the action for trial.

“The party giving notice.” The defendant, as we have seen, can give the notice under the circumstances mentioned in Rule 4.

The Rule as to entry of causes in London and Middlesex was, that whether the sitting were within term or after term, the causes must have been entered before 5 p.m. on *the day next but one preceding the sitting*.† The Rule prior to this made a distinction between entering causes within term and entering them after term.‡ The Rule as to entering causes on the day next but one preceding the sitting is not, of course, affected by the present Rule, which provides a very swift remedy for the laches of a party giving notice of trial, and not immediately entering the cause for trial in London and Middlesex.

As to trial by proviso, which was the only case formerly in which the defendant could enter the cause for trial, see the note to Rule 4 of this Order, *supra*.

The party entering the cause for trial in London and Middlesex took the record, with the panel of jurors annexed, to the Associate's Office, and entered the cause for trial with the Associate.

Rule 15.

If notice of trial is given for elsewhere than in London or Middlesex, either party may enter the action for trial. If both parties enter the action for trial, it shall be tried in the order of the plaintiff's entry.

The defendant, as we have seen (see notes to Rules 4 and 14 of this Order, *supra*), could only *enter* the action for trial in the case of trial by proviso, in which case he also gave the *notice* of trial.

The present Rule is in accordance with the previously existing practice as to trial by proviso. By s. 116 of the Common Law Procedure Act, 1852:—“If records are entered for trial both by the plaintiff and the defendant, the defendant's record shall be treated as standing next in order after the plaintiff's record in the list of causes, and the trial of the cause shall take place accordingly.” If the plaintiff's notice of trial be insuffi-

* 1 Charley's Cases (Chambers), 122.

† Reg. Gen. Trin. Vac., 1868.

‡ Reg. Gen. Hil. T., 1853, Rule 43.

Ord. XXXVI., Rule 15. cient, his entry will be a nullity, and the defendant may go to trial on his entry, and if the plaintiff does not appear he will be nonsuited (*Brown v. Otiley**).

Rule 16.

The list or lists of actions for trial at the sittings in London and Middlesex respectively shall be prepared, and the actions shall be allotted for trial without reference to the Division of the High Court to which such actions may be attached.

This Rule is a re-enactment of Rule 29 of the Principal Act, with the omission of the words, "in such manner as may be prescribed by Rules of Court," after "allotted for trial."

The Rule will effect a great improvement. The Common Pleas at Guildhall had about 20 special jury cases for 100 set down for trial in the Queen's Bench at Guildhall.

The Rule applies to the Chancery Division equally with the other Divisions. Per Bagallay, L.J., in *Warner v. Murdoch*, *Murdoch v. Warner*.†

Rule 17.

The party entering the action for trial shall deliver to the officer a copy of the whole pleadings in the action, for the use of the Judge at the trial. Such copy shall be in print, except as to such parts, if any, of the pleadings as are by these Rules permitted to be written.

Every pleading which contains more than 10 folios of 72 words each (not being a petition or summons) must, by Order XIX., Rule 5a, *supra*, be printed. As to printing, see also the Rules of the Supreme Court (Costs), Orders I. to V.

In trials at bar four copies of the issue had to be made out by the Master for the use of the Judges.‡

Four clear days before the day appointed for argument of questions of law, the plaintiff delivered, at the Judges' Chambers in Serjeants' Inn, copies of the demurrer-book, special case, special verdict or appeal cases, with the points intended to be insisted on, to the Chief, and also to the Senior Puisne Judge of the Court in which the action was brought, and the defendant delivered copies to the other Judges of the Court next in seniority.§ See now Order XXVIII., Rule 6, note.

This Rule will be of great utility in enabling the Judge in a trial at Nisi Prius to make himself thoroughly acquainted with the pleadings before the case is called on.

* 1 B. and A., 253.

† 4 Ch. D., 750; 46 L. J. (Ch.), 121; 35 L. T., 748.

‡ Archbold's Practice, Part I., chap. XI., p. 374.

§ Reg. Gen., Hil. T., 1853, Rule 16.

Rule 17a.

Ord. XXXVI.,
Rule 17a.

The first sentence of Order XXXVI., Rule 17, shall be altered as follows:—The party entering the action for trial shall deliver to the officer two copies of the whole of the pleadings in the action, one of which shall be for the use of the Judge.

In the second sentence the word “Copies” shall be substituted for “Copy.”

This new Rule was added by Rule 14 of the Rules of the Supreme Court, December, 1875.

The following notice has been issued by the Chancery Division in reference to this Rule:—

“No causes or actions will in future be entered for trial, unless two copies of the whole pleadings are, pursuant to the present “Rule, delivered to the officer at the same time.”*

Rule 18.

If, when an action is called on for trial, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him.

This Rule is merely a rehearsal of the existing practice. “If,” says Mr. Archbold, “the defendant’s attorney and witness be not in attendance when the cause is called on, the plaintiff may proceed in their absence.”†

In *Goode v. Waite*,‡ when the case was called on, neither plaintiff nor defendant appeared. It turned out that the action had been referred, but no notice had been given to the officer of the Court. Manisty, J., animadverted severely on the “neglect of duty” on the part of the solicitors in the case.

Rule 19.

If, when an action is called on for trial, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counterclaim, shall be entitled to judgment dismissing the action; but if he has a counterclaim, then he may prove such claim so far as the burden of proof lies upon him.

The first part of this Rule is in accordance with the previously existing practice. “If the plaintiff’s attorney and witnesses,” says Mr. Archbold,

* W. N., 1877 (Notices), p. 239, cited *infra*.

† Archbold’s Practice, p. 381.

‡ *Times*, Tuesday, November 25th, 1876.

**Ord. XXXVI.,
Rule 19.**

"be not in attendance when the cause is called on, the plaintiff will be *non-suited*."*

The second part of the Rule is based upon the analogy of the practice in the case where the defendant does not appear; the plaintiff being, to all intents and purposes, the defendant to the counterclaim.

An action was dismissed by Huddleston, B., under this Rule, for the non-appearance of the Counsel for the plaintiff, and judgment was entered for the defendant. Huddleston, B., refused to set aside the judgment so entered for the defendant, although the Counsel for the plaintiff had been prevented from appearing in time by the selection of an unusual place for holding the sitting of the Court.†

Judgment was given under this Rule by Lord Coleridge, C.J., dismissing an action, under the following circumstances:—The action on the previous day appeared on the list of causes for trial at Nisi Prius in the Queen's Bench Division, and, if it had remained on that list, it would have stood second on the morning in question. It had, however, without any notice to the plaintiff, on the previous evening, been transferred to the Common Pleas list, where it stood first, and the plaintiff's witnesses were not present when the case was called on.‡

An appeal in an action, commenced under the old practice, was dismissed by the Court of Appeal for non-appearance of the Counsel for the appellant. The Counsel for the appellant having subsequently explained that the reason for his non-appearance was that neither party could deliver error books in time, owing to the shortness of the notice of the sitting, the Court of Appeal ordered the appeal to be restored without costs.§

Where, for default of appearance of the plaintiff at the trial, the defendant is entitled to judgment dismissing the action, the jury should not be sworn.||

See, also, *Farrell v. Wale*.¶

Rule 20.

Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within six days after the trial; such application may be made either at the Assizes or in Middlesex.

The method of remedying any injustice occasioned by the non-appearance of one of the parties when the cause was called on, has generally

* Archbold's Practice, p. 381.

† *Webster v. The Coal Consumers' Company*, 1 Charley's Cases (Court), 131; *Times*, November 15, 1875.

‡ *Hackett v. Clifford*, *Times*, Saturday, July 29, 1876.

§ *Reed v. Pritchard*, 1 Charley's Cases (Court), 133; *Times*, Nov. 20, 1875.

|| *Lane v. Eve*, 2 Charley's Cases (Chambers), 65. Per Denman, J.
¶ 36 L. T., 95.

been hitherto by *new trial*. When a cause was called on as undefended, which stood thirty off in the list, and no notice had been given that it would be taken as an undefended cause, the Court granted a new trial.* In a similar case, where the notice was not given till late on the previous night, the Court granted a new trial.†

Ord. XXXVI.,
Rule 20.

The remedy provided by the present Rule is a speedier and less costly one. An "affidavit of merits" will be necessary.

Where a defendant had instructed a solicitor to enter an appearance for him and defend the action, and the solicitor entered an appearance for him accordingly, but took no further steps in the action, and the defendant did not know until more than six days after the trial of the action that it had been tried and judgment recovered against him, the Court, on an application by the defendant *within six days of his having heard that the action had been tried*, granted him an extension of time to enable him to apply to set aside the judgment.‡

In *Wilkins v. Bedford*,§ however, where the defendant, in a foreclosure suit, obtained an order for leave to file a counterclaim by way of set-off, and through the negligence of his solicitor no counterclaim was delivered, and a decree of foreclosure was made in his absence, an application more than six months afterwards for leave to file the counterclaim was refused by Bacon, V. C., on the ground of delay.

Rule 21.

The Judge may, if he think it expedient for the interests of justice, postpone or adjourn the trial for such time, and upon such terms, if any, as he shall think fit.

This Rule is taken from s. 19 of the Common Law Procedure Act, 1854.

Rule 22.

Upon the trial of an action the Judge may, at or after such trial, direct that judgment be entered for any or either party, as he is by law entitled to upon the findings, and either with or without leave to any party to move to set aside or vary the same, or to enter any other judgment, upon such terms, if any, as he shall think fit to impose; or he may direct judgment not to be entered then, and leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or Judge.

The Judicature Commissioners recommended that the Judge at the trial should, *without consent of the parties*, have power to reserve leave to the Court to enter a nonsuit or verdict.

The Court or a Judge had, under s. 110 of the Common Law Procedure Act, 1852, and Reg. Gen., Hil. T., 1853, Rule 67, power to stay the signing of judgment, under the old practice.||

This Rule is repealed by Rule 22a of this Order, *infra*, the provisions of which are simpler and more concise. See the note to that Rule, *infra*.

* *Aust v. Fenwick*, 2 Dowl., 246; *Dorriers v. Howell*, 8 Dowl., 277: Bing., N. C., 245. † *De Medina v. Sharpnell*, 12 L. J. (N. S.) C.P., 37.

‡ *Michell v. Wilson*, 25 W. R., 380. § 35 L. T., 622.

|| Archbold's Practice, p. 524; *Yates v. The Dublin Steam Packet Company*. 6 M. and W., 71; 8 Dowl., 482.

Ord. XXXVI.,
Rule 22a.

Rule 22a.

Order XXXVI., Rule 22, is hereby repealed, and instead thereof the following Rule shall take effect :—

Upon the trial of an action the Judge may, at or after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or Judge.

This new Rule was added by Rule 3 of the Rules of the Supreme Court, December, 1876.

It will be seen that Rule 22 has been shortened and simplified. The present Rule was issued on the day that s. 17 of the Appellate Jurisdiction Act, 1876, came in force, and its object, like that of the section just mentioned is to enhance the power of a single Judge in the Common Law Divisions.

“No judgment shall be entered after a trial without the order of a Court or Judge.” By section 56 of the Principal Act, it is provided “that the report of any Official or Special Referee may be adopted wholly or partially by the Court, and may, if so adopted, be enforced as a judgment of the Court.” In *Wallis v. Lichfield*,* on motion, under that section and the present Rule, by Counsel for the plaintiff, upon affidavit of service, Hall, V. C., ordered that judgment should be entered in conformity with a Special Referee’s report.

It is not necessary, however, to move for judgment under this Rule and Order XL., in the case of an action commenced in the High Court, and remitted to a County Court. Judgment can still be signed in the High Court in the case of an action so remitted, on the production at the Master’s office of the certificate of the Registrar, pursuant to s. 26 of the County Court Act, 1856 (19 & 20 Vict. c. 108).†

Rule 23.

Upon every trial at the Assizes, or at the London and Middlesex sitting of the Queen’s Bench, Common Pleas, or Exchequer Division, where the officer present at the trial is not the officer by whom judgments ought to be entered, the Associate shall enter all such findings of fact as the Judge may direct to be entered, and the directions, if any, of the Judge as to judgment, and the certificates, if any, granted by the Judge, in a book to be kept for the purpose

* W. N., 1876, p. 130.

† *Scutt v. Freeman*, 2 Q. B. D., 177; 46 L. J. (Q. B.), 173; 25 W. R., 251; 35 L. T., 939.

"The officer by whom judgments ought to be entered." By Order **Ord. XXXVI., Rule 23.**
XLI., Rule 1, it is provided that "every judgment shall be entered by the proper officer, in a book to be kept for the purpose."

The word "Associate" is defined by Wharton in his Law Lexicon to mean an officer whose duties are to superintend the entry of causes; to attend the sittings at Nisi Prius, and there receive and enter verdicts; to draw up the postea and any orders of Nisi Prius.

The Statutes relating to Clerks of Assize and to Associates are 33 Hen. VIII. c. 24; 15 and 16 Vict. c. 73; 18 and 19 Vict. c. 126; and 32 and 33 Vict. c. 89.

The Stat. of Hen. VIII. speaks of "persons that now are Clerks of Assize and shall be associate to any Justice of Assize in any county within the realm of England."

There are Associates and Associates. Three in London—one for each of the Common Law Courts; and eight in the provinces—one for each circuit.*

"The Clerks of Assize are defined by Wharton in his Law Lexicon to be officers who officiate as Associates in the Circuits. They record all judicial proceedings done by the Judges on circuit." There are, however, Associates on each Circuit distinct from the Clerks of Assize. The latter confine their attention to the Crown side.

Rule 24.

If the Judge shall direct that any judgment be entered for any party absolutely, the certificate of the Associate to that effect shall be a sufficient authority to the proper officer to enter judgment accordingly. The certificate may be in the Form No. 15 in Appendix (B) hereto.

This form is new.

As to entering judgment, see Order XLI., *infra*. See also Rule 22a of this Order, *supra*, as to the power of the Judge to direct that judgment shall be entered.

See further, as to the certificate, the note to Order XLI., Rule 5, *infra*.

Rule 25.

If the Judge shall direct that any judgment be entered for any party subject to leave to move, judgment shall be entered accordingly upon the production of the Associate's certificate.

As to entering judgment, see Order XLI., *infra*.

See also s. 46 of the Principal Act and Rule 22 of this Order, *supra*. "With leave to move," which occurs in Rule 22, is omitted from the new Rule 22a, *supra*, but is retained in Order XL., Rule 2, *infra*.

Rule 26.

The Court or a Judge may, if it shall appear desirable, direct a trial without a Jury of any question or issue

* Most of the latter, however, live in London. See the Law List.

Ord. XXXVI., of fact, or partly of fact and partly of law, arising in any
Rule 26. cause or matter which previously to the passing of the Act
 could, without any consent of parties, be tried without a
 Jury.

This Rule was framed expressly to meet cases which would, under the old system, have been tried in the Chancery Division, and which might be considered as pure mixture of law and fact, or otherwise not capable of being conveniently tried before a jury.*

The plaintiff or the defendant, as the case may be, under Rules 3 and 4 of this Order, and section 22 of the Principal Act, *supra*, has a statutory right to a trial of the action "before a Judge and jury," *qualified only by the discretion given to the Court of directing a trial without a jury in cases falling under the present Rule*. Per Bacon, V. C., in *West v. White*.† Where the action is a proper one to be tried by a jury a Judge, even of the Chancery Division, is bound to send it to be so tried. Per Jessel, M. R., in *Bordier v. Russell*.‡ Malins, V. C., in *Sykes v. Firth*,§ refused a motion on the part of *the plaintiff*, under Rule 3 of this Order,|| to have the action tried "before a Judge and jury" at the next Leeds Assizes, on the ground that the action was one for specific performance, and therefore "peculiarly within the jurisdiction of the Chancery Division."

The same learned Judge, in *Back v. Hay*,¶ refused a motion, under Rule 3 of this Order, by *one of the defendants*, to have the action tried "before a Judge and jury," on the ground that the action was one for rescission of a contract which the plaintiff alleged that he had been induced to enter into by the fraud of the defendants, and questions of fraud were "peculiarly within the jurisdiction of the Chancery Division." Malins, V. C., at the same time expressed his approval of the decision of Bacon, V. C., in *West v. White*.**

The same learned Judge, in *Pilley v. Baylis*,†† acceded to a motion, on the part of *the defendants*, that the action might be heard by his lordship alone, instead of being tried in the Exchequer Division by a special jury, pursuant to notice given by the plaintiff under Rule 3 of this Order, and the notice of the Senior Registrar of the Chancery Division of February, 1877, on the ground that, although the plaintiff had added a claim for damages for false representation, the action was substantially one for specific performance, and therefore "peculiarly within the jurisdiction of the Chancery Division." *West v. White*,‡‡ which Bacon, V. C., sent to be tried by a jury, was an action to restrain an alleged nuisance from cement works. *Bordier v. Russell*,§§ which Jessel, M. R. sent to be tried

* *Clarke v. Cookson*, 2 Ch. D., 746; 45 L. J. (Ch.), 752; 34 L. T., 646; 24 W. R., 535. Per Hall, V. C. Or in the Probate Division, Rules, 1862, Rs. 47-49.

† 4 Ch. D., 631; 46 L. J. (Ch.), 333; 25 W. R., 342; 36 L. T., 95. See also the other cases cited under Rule 3 of this Order, *supra*.

‡ 5 Ch. D., 512.

§ W. N., 1877, p. 38; 12 N. C., 95.

|| See s. 34 of the Principal Act, *supra*.

¶ 5 Ch. D., 235; 36 L. T., 295; 25 W. R., 392.

** 4 Ch. D., 631; 46 L. J. (Ch.), 333; 25 W. R., 342; 36 L. T., 95.

†† 5 Ch. D., 241; 36 L. T., 296.

‡‡ 4 Ch. D., 631; 46 L. J. (Ch.), 333; 25 W. R., 342; 36 L. T., 95.

§§ 5 Ch. D., 512.

by a jury, was an action to restrain the defendant from obstructing the plaintiff's ancient lights. Ord. XXXVI.,
Rule 28.

Where the intention of the parties has to be gathered from a series of documents, or a voluminous correspondence, an action brought in the Chancery Division ought not to be tried by a jury.*

Rule 27.

The Court or a Judge may, if it shall appear, either before or at the trial, that any issue of fact can be more conveniently tried before a Jury, direct that such issue shall be tried by a Judge with a Jury.

See Rules 3 and 4 of this Order, and the cases cited under these Rules, *supra*, as to the power of one of the parties to insist on a trial by Jury.

See also Rule 26, as to the discretion given to the Court of directing a trial without a Jury, and the cases cited under that Rule; and Rules 29 and 29a of this Order, *infra*, as to the power of the Court or a Judge to send actions for trial in London or Middlesex or at the Assizes, "before a Judge and jury."

In *Swindell v. The Birmingham Syndicate*, *The Birmingham Syndicate v. Swindell*,† Hall, V.C., refused to order two actions, one for specific performance of an agreement, and the other to set it aside on the ground of fraud, to be tried before a Judge and jury. His lordship said, that he would not be justified in sending the case for trial by a jury, when there were other issues involved which might dispose of the case independently of the issues of fact. The Court of Appeal said,‡ that the suits were such as could only have been tried under the old practice in the Court of Chancery, and it would have been in the discretion of the Judge whether they should be tried by a jury. In such cases it was still a matter in the discretion of the Judge, whether there should be a trial by jury or not; and the Court of Appeal would not interfere with the discretion of the Vice-Chancellor.

Rule 28.

Trials with assessors shall take place in such manner and upon such terms as the Court or a Judge shall direct.

By Rule 2 of this Order, *supra*, actions may be tried before a Judge sitting with assessors, or before an Official or Special Referee sitting with assessors. Of course this mode of trial is not applicable to trial by jury. By s. 56 of the Principal Act, *supra*, the assessors are to be "specially qualified," and the cause may be tried wholly or partly§ with their assistance. See, further, the note to that section.

The system of trial of questions of damages and accounts before the

* Per Hall, V.C., in *Garling v. Royds*, 25 W. R., 123.

† 3 Ch. D., 127; 45 L. J. (Ch.), 756; *Times*, Monday, May 29, 1876.

‡ 3 Ch. D., 131; 45 L. J. (Ch.), 758; 35 L. T., 111; 24 W. R., 911.

§ Rule 6 of this Order, *supra*, would also seem to sanction this.

**Ord. XXXVI.,
Rule 28.**

Registrar of the Admiralty Court and his nautical assessors will probably be the model for trials before Judges or Referees and their assessors.* In special cases the Judge of the Court of Admiralty sits with two Masters as assessors; and the Court of Appeal sits with nautical assessors in Admiralty causes.† (See Williams and Bruce on Admiralty Practice, Part II., c. VIII.)

Rule 29.

In any cause the Court or a Judge of the Division to which the cause is assigned may, at any time, or from time to time, order the trial and determination of the question or issue of fact, or partly of fact and partly of law, by any Commissioner or Commissioners appointed in pursuance of the 29th section of the said Act, or at sittings to be held in Middlesex or London, and the question or issue shall be tried and determined accordingly.

The Commissioners eligible under s. 29 of the Principal Act, *supra*, are the Common Law Judges, the then *future* Divorce, Admiralty, Probate, and Chancery Judges, Serjeants-at-Law, and Queen's Counsel, and, under the Appellate Jurisdiction Act, 1876, the three new Judges of Appeal.

This Rule should be read in connection with sections 29, 30, and 31 of the Principal Act; and Rules 3, 4, 16, 26 and 27 of this Order, *supra*, and Rule 28 of this Order, *infra*.

In the case of *Wright v. Wright*, which was an action in the Chancery Division for damages for false representations, the Lord Chancellor refused an application by the defendant that the action should be transferred to the Queen's Bench Division, observing that there was no reason why an action for damages should not be tried by jury in the Chancery Division.

Wright v. Wright was an administration suit, in which there was a preliminary question as to whether the plaintiff who claimed to be a creditor of the intestate's estate, was a bona fide holder for value of a bill of exchange accepted by the intestate; the plaintiff gave notice of trial by jury to the Master of the Rolls, but, finding that there would be a difficulty in getting the action so tried, he withdrew his notice, and gave notice of trial before the Judge only. The defendant, however, insisted under Rule 28 of this Order, upon his right to have the action tried before a Judge and jury; and Hall, V.C., at the hearing decided that the defendant had a right to have the action so tried, but not before

* As to assessors in the County Courts in Admiralty causes see 31 and 32 Vict. c. 71, ss. 10, 11, 14, 15, 16.

† 1 Charley's Cases (Court), 145, 147.

‡ 1 Ch. D., 1; 45 L. J. (Ch.), 50; 33 L. T., 402; 24 W. R. 91; 1 Charley's Cases (Court), 154 (Nov. 25, 1875.)

§ 2 Ch. D., 746; 45 L. J. (Ch.), 752; 34 L. T., 646; W. R. 535 (March 27th, 1876.)

him. The Vice-Chancellor said, that the question whether a Judge of the Chancery Division could try an action with a jury under the new practice, had been much considered by the M. R., Malins, V.C., and himself, and they considered that it could not. It was finally arranged, in *Clarke v. Cookson*, that issues should be settled to be tried at the Middlesex sittings.

Ord. XXXVI.,
Rule 29.

In *Cave v. Mackenzie*,* Jessel, M.R., before whom the action was set down to be tried, made an order under the present Rule, that "the issue of fact" in the case should be tried before a jury at the Assizes at Chelmsford. Huddleston, B., after consulting with Cockburn, C.J., refused to try the action at those Assizes, on the ground that it was brought in the Chancery Division, and ought to be tried in that Division by the Master of the Rolls. The case was accordingly ordered to be struck out of the list. The Court of Appeal refused to entertain an appeal from this Order, on the ground that no appeal lay to them from such an order at Nisi Prius.

Matters came to such a pass, that in July, 1876, the Registrars of the Chancery Division declined, without the direction of a Vice-Chancellor, to set down the case of *Garling v. Royds* in the Chancery Division for trial by jury in that Division; and the Court of Appeal, when appealed to, said it had no power to give the Registrars any directions; while, on the other hand, the Associates of the Common Law Divisions equally refused to set the action down for trial by jury in Middlesex, on the ground that the Chancery Judges ought to try their own actions!†

At the Hertford Summer Assizes, in 1876, the Lord Chief Justice of England, referring to an action sent down for trial by jury at that Assizes from the Chancery Division by the Master of the Rolls, however, said ‡:—

"I fully admit that there are many cases in which it is highly desirable and beneficial, that the power given to the Court or a Judge under Order XXXVI., Rule 29, shall be exercised by a Judge of the Equity Division; where, for instance, it may be expedient that the jury should have a view, or where the witnesses all come from the locality. I quite agree that the present is a case in which the learned Master of the Rolls, who made the order, was right in making it; and, I therefore, readily and cheerfully take upon myself the trial of that cause."

At this stage in the controversy, the following new Rule was issued:—

Rule 29a.

Where in any action in the Chancery Division, the action or any question at issue in the action is ordered to be tried before any Commissioner or Commissioners of Assize, or at the London or Middlesex sittings of any

* W. N., 1876, p. 237; 2 Charley's Cases (Court), 11; *Times*, Thursday, July 20th, 1876. (July 19th, 1876.)

† *Times*, August 2nd, 1876; 2 Charley's Cases (Court), 12; before Hall, V.C., and in the Court of Appeal.

‡ *Times*, Wednesday, July 26th, 1876.

Ord. XXXVI., Division other than the Chancery Division, the order
 Rule 29a. directing such trial shall state on its face the reason for which it is expedient that the action, question, or issue should be so tried, and should not be tried in the Chancery Division.

This new Rule was added by the 4th Rule of the Rules of the Supreme Court, December, 1876. The new Rule did not, however, settle the question as to whether a Judge of the Chancery Division, sitting as such, could be called upon to try an action with a jury in that Division.

In January, 1877, in the case of *Warner v. Murdoch, Murdoch v. Warner*,* this question was finally set at rest by the Court of Appeal, who held (supporting the refusal of Jessel, M.R., to try the action himself with a jury), that under the new practice a Judge of the Chancery Division, sitting as such, in that Division cannot try an action with a jury. When an action in the Chancery Division has been ordered to be tried "before a Judge and jury," it must be set down in its turn in the general list to be tried before one of the Judges of the Common Law Divisions; if it is a London case, at the London sittings for trial by jury; if it is a Middlesex case, at the Middlesex sittings; or, if it is a country case, at the Assizes. It will be tried by the Common Law Judge to whom the duty may be allotted at the particular sittings or Assizes of trying actions at Nisi Prius on the day on which it comes on in its turn for trial.†

Warner v. Murdoch, Murdoch v. Warner, was decided, as already stated, in January, 1877. In February, 1877, the following official notice, signed by the Senior Registrar of the Chancery Division,‡ appeared§:—

"In actions assigned to the Chancery Division, when the plaintiff, under Order XXXVI., Rule 3, of the Rules of the Supreme Court, gives Notice of Trial before a Judge and jury, the action is to be entered for Trial with the Associates, instead of with the Chancery Registrar.

"Where, after the plaintiff has given notice of trial in any other manner, and has set down the action in the Chancery Division, the defendant has, under the provisions of the same Rule, given notice that he desires to have the issues of fact tried before a Judge and jury, the action will be marked in the Cause Book "Jury trial at defendant's instance" on the request of the solicitor for either party, and on the certificate of such solicitor, that such notice has been duly given within the time, or extended time, referred to in Rule 3.

"Actions which have been so marked will be added by the Associates to their list of actions for trial, upon the solicitor for either party bringing to them the certificate of the Chancery Registrar in the form given below, annexed to the statement of claim. Such actions will be placed in the list in the order in which they are entered with the Associates."

* 4 Ch. D., 750; 46 L. J. (Ch.), 121; 35 L. T., 748 (January 13th, 1877.)

† This decision was mainly based on the language of sections 30 and 37 of the Principal Act, and Rule 16 of the present Order, which see, *supra*.

‡ Mr. Leach.

§ W. N., 1877 (Notices) p. 88; cited *infra*.

**Ord. XXXVI.,
Rule 28a.**

"I certify that this action was entered for trial in the Cause Book of the Chancery Division on the day of , and that it has been this day marked 'Jury trial at defendant's instance,' in accordance with a Notice given by the defendant under Order XXXVI., Rule 3, of the Rules of the Supreme Court.

66

Rule 29b.

The business to be referred to the Official Referees appointed under the Supreme Court of Judicature Act, 1873, shall be distributed among such Official Referees in rotation by the clerks to the Registrars of the Supreme Court, Chancery Division, in like manner in all respects as the business referred to Conveyancing Counsel appointed under the Act of the 15th and 16th Vict. cap. 80, sec. 41, is directed to be distributed by the second of the Consolidated General Orders of the Court of Chancery.

See as to Official Referees, secs. 56, 57, 58, 59 and 83 of the Principal Act, *supra*.

By Rule 1 of Order II. of the Consolidated General Orders of the Court of Chancery, "the business to be referred to the Conveyancing Counsel nominated by the Lord Chancellor under the Stat. 15 and 16 Vict. c. 80, s. 41, shall be distributed among such Counsel in rotation by the first clerk to the Registrars for the time being, and during his occasional absence by the second clerk to the Registrars for the time being, and during the occasional or necessary absence of both such clerks, then by such one of the other clerks to the Registrars as the Senior Registrar for the time being may nominate for that purpose."

By Rule 2, "the clerk making" the "distribution shall be responsible for the business being distributed according to regular and just rotation, and in such manner as to keep secret from all persons the rotation or succession of Conveyancing Counsel to whom such business may be

* *Pilley v. Baylis*, 5 Ch. D., 241; 36 L. T., 296; W. N., 1877, p. 64. See the note to Rule 26 of this Order, *supra*.

634 SUPREME COURT OF JUDICATURE ACT, 1875.

Ord. XXXVI., referred; and it shall be his duty to keep a record of such references with proper indexes, and to enter therein all such references with the dates when the same are made."
Rule 29b.

By Rule 4, "in case the Conveyancing Counsel in rotation shall from illness or from any other cause be unable or decline to accept any such reference, the same shall be offered to the other Conveyancing Counsel appointed as aforesaid successively, according to their seniority at the Bar, until some one of them shall accept the same."

The remaining Rules (Rules 3 and 5), are adapted by Rules 29c and 29d of this Order, *infra*.

Where it appears by the pleadings that there is a preliminary question of law to be decided, the action is not a suitable one to be referred to an Official Referee.*

A plaintiff, who elects to have the action tried before an Official Referee, has no right to name any particular Referee in his summons.†

Rule 29c.

When an order shall have been made referring any business to the Official Referee in rotation, such order, or a duplicate of it, shall be produced to the Registrar's clerk, whose duty it is to make such distribution as aforesaid; and such clerk shall (except in the case provided for by Rule 29d of this Order) endorse thereon a note specifying the name of the Official Referee in rotation to whom such business is to be referred; and the order so endorsed shall be a sufficient authority for the Official Referee to proceed with the business so referred.

This new Rule was added by the 15th Rule of the Rules of the Supreme Court, June, 1876. The Rule is adapted from Rule 3 of Order II. of the Consolidated Orders of the Court of Chancery.

Rule 29d.

The two last preceding Rules of this Order are not to interfere with the power of the Court, or of the Judge at chambers, to direct or transfer a reference to anyone in particular of the said Official Referees, where it appears to the Court or the Judge to be expedient; but every such reference or transfer shall be recorded in the

* *Lascelles v. Butt*, 2 Ch. D., 588; 24 W. R., 659.

† See per Bacon, V.C., in *Lascelles v. Butt*, 2 Ch. D., 588; and see Rule 2 of Order II. of the Consolidated General Orders, *supra*.

manner mentioned in Rule 2 of the second of the said Consolidated General Orders,* and a note to that effect be endorsed on the order of reference or transfer ; and in case any such reference or transfer shall have been or shall be made to any one in particular of the said Referees, then the clerk in making the distribution of the business according to such rotation as aforesaid, shall have regard to any such reference or transfer.

Ord. XXXVI.,
Rule 29d.

This new Rule was added by Rule 16 of the Rules of the Supreme Court, June, 1876. The Rule is adapted from Rule 5 of Order II. of the Consolidated Orders of the Court of Chancery.

Rule 30.

Where any cause or matter, or any question in any cause or matter, is referred to a Referee, he may, subject to the order of the Court or a Judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the Court or a Judge, proceed with the trial *de die in diem*, in a similar manner as in actions tried by a Jury.

This Rule is a re-enactment of Rule 34 of the Principal Act, the words "any cause" being substituted at the commencement for "an action." See as to Referees, sections 56, 57, 58, 59, and 83 of the Principal Act, and Rules 2 and 5 of this Order, *supra*. This and the remaining Rules of this Order are framed under the authority of s. 57 of the Principal Act, *supra* :—"All such trials before Referees shall be conducted in such manner as may be prescribed by Rules of Court."

"Subject to the order of the Court or a Judge." By s. 57 of the Principal Act, "subject to Rules of Court, all such trials before Referees shall be conducted in such manner as the Court or a Judge ordering the same shall direct."

"Proceed with the trial *de die in diem*." These words are directory merely. If the Referee does not proceed with the reference *de die in diem*, the Court will remove him, if its attention is called at the time to this neglect of duty. A plaintiff, however, who silently acquiesces in it by continuing to attend the reference, cannot, when the Referee has

* See this Rule set out in the note to Rule 29b of this Order, *supra*.

Ord. XXXVI., decided in the defendant's favour, move to set aside the award on the
Rule 30. ground that the Referee did not sit *de die in diem*.*

Rule 31.

Subject to any order to be made by the Court or Judge ordering the same, evidence shall be taken at any trial before a Referee, and the attendance of witnesses may be enforced by *subpœna*, and every such trial shall be conducted in the same manner, as nearly as circumstance will admit, as trials before a Judge of the High Court, but not so as to make the tribunal of the Referee a public Court of Justice.

See the 3 & 4 Wm. IV. c. 42, s. 4.

Rule 32.

Subject to any such order as last aforesaid, the Referee shall have the same authority in the conduct of any reference or trial as a Judge of the High Court when presiding at any trial before him.

See Rule 22 of this Order, *supra*, as to the powers of a Judge over the entry of judgment.

Rule 33.

Nothing in these Rules contained shall authorise any Referee to commit any person to prison, or to enforce any order by attachment or otherwise.

The Rule expressly denies to Referees the powers inherent in a Court of Record of committal for contempt of Court. As soon as he has given his decision the Referee is *functus officio*, and the duty of enforcing it belongs to the Court or the Judge who directed the reference.

Rule 34.

The Referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any facts specially, with power to the Court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall

* *Robinson v. Robinson*, 35 L. T., 337; 24 W. R., 675.

be entered as the Court may direct; and the Court shall have power to require any explanation or reasons from the Referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other Referee.

Ord. XXXVI.,
Rule 34.

This Rule is a re-enactment of Rule 35 of the Principal Act.

These Rules give the Court more power over a Referee, than formerly over an Arbitrator. An important check over Referees is also afforded by Order XL., Rule 5, *infra*.

When an Official Referee has made a report on a cause or matter referred to him, the Court will not entertain an application under the present Rule to "remit" the cause or matter to him for re-trial or further consideration, unless the application be supported by evidence on affidavit or otherwise.*

See, further, as to Referees, the following cases which will be found briefly epitomized under secs. 58 and 59 of the Principal Act, *supra* : *Rowcliffe v. Leigh*;† *The Baltic Company v. Simpson*;‡ *Broder v. Saillard*,§ and *Cruikshank v. The Floating Baths Swimming Company, Limited*.||

ORDER XXXVII.

EVIDENCE GENERALLY.

Rule 1.

In the absence of any agreement between the parties, and subject to these Rules, the witnesses at the trial of any action or any assessment of damages, shall be examined *vidé voce* and in open Court, but the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or exa-

* *Stubbs v. Boyle*, 2 Q. B. D., 124; 35 L. T., 906; 25 W. R., 184.

† 3 Ch. D., 292; 24 W. R., 782; 2 Charley's Cases (Court), 128. Also 4 Ch. D., 661; 46 L. J. (Ch.), 60; 25 W. R., 56.

‡ 24 W. R., 390; 2 Charley's Cases (Court), 119.

§ 2 Ch. D., 692; 45 L. J. (Ch.), 414; 24 W. R., 456; 2 Charley's Cases (Court), 121.

|| 1 C. P. D., 260; 45 L. J. (C. P.), 684; 34 L. T., 733; 24 W. R., 644; 2 Charley's Cases (Court), 128.

Ord. XXXVII., miner; provided that where it appears to the Court or
Rule 1. Judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

This Rule is a re-enactment of Rule 36 of the Principal Act.

The Rule is a compromise between the practice of the Courts of Common Law and Equity, respectively. The Common Law practice of *vivâ voce* examination is to prevail, but power is given to the Court to order proof by affidavit in exceptional cases.

This Rule is referred to in the 20th section of the present Act, *supra* :—
 “Nothing in this Act or in the first Schedule hereto, or in any Rules of Court to be made under this Act, *save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read*, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to jurymen or juries.”

In the Court of Chancery the evidence in chief was taken either by affidavit or orally before an examiner, generally in the absence of the opposite party, who had, however, the power of cross-examination at a later stage, either orally before an examiner, or in open Court.

This Rule, down to the word “provided,” is copied, almost *verbatim*, from the recommendations of the Judicature Commission.*

The last part of the Rule (from “provided” to the end) is new. The Judicature Commission recommended that “any witness *who had made an affidavit* should be liable to cross-examination.” See Rule 2 of this Order, *infra*, where a similar recommendation has been adopted.

As to affidavit evidence, see Order XXXVIII.

“In the absence of any agreement between the parties.” The consent to have the evidence taken by affidavit under this Rule (see Order XXXVIII., Rule 1) must be a written consent in writing. It must not be left to be inferred merely from a correspondence between the parties.†

Where, in a suit pending on the 1st of November, 1875, in which replication had not, at that date, been filed, or notice of motion for decree given, the plaintiff applied to have the evidence taken by affidavit and the defendant opposed the application, Malins, V.C., refused it, but reserved the costs of the application to the hearing,‡ and Bacon, V.C., at the hearing, although he gave the defendant the general costs of the cause, disallowed him the costs of the application, to mark his sense of the defendant’s “perverse, unreasonable and unjust” conduct. The defendant in this case was a trustee, and the greater part of the expense of preparing affidavits had been incurred before the 1st of November, 1875.§

A guardian *ad litem* can consent on behalf of infant defendants to the taking of evidence by affidavit under this Rule.|| It is not necessary that an order of the Court should be obtained.¶

* First Report, p. 14.

† *The New Westminster Brewery Company v. Hannah*, 1 Ch. D., 278; 24 W. R., 137; 1 Charley’s Cases (Court), 138. Per Hall, V.C.

‡ *Pattison v. Wooler*, 1 Ch. D., 464; 1 Charley’s Cases (Court), 136.

§ 2 Ch. D., 586; 45 L. J. (Ch.), 274; 34 L. T., 415; 24 W. R., 455.

|| *Knatchbull v. Fowle*, 1 Ch. D., 604; 24 W. R., 629.

¶ *Fryer v. Wiseman*, 45 L. J. (Ch.), 199; 33 L. T., 779; 24 W. R., 629.

In *Gardiner v. Hardy*,* which was a foreclosure suit, commenced before the 1st of November, 1875, the defendants, who were resident out of the jurisdiction, had made *default in appearance*, and the plaintiff applied for leave (amongst other things) to prove his case by affidavit at the hearing. Bacon, V.C., said that he could not order the evidence to be taken by affidavit.

Ord. XXXVII.,
Rule 1.

In an action brought for the purpose of proving a will in solemn form, where none of the parties cited had appeared, Hannon, J., refused to order the execution and attestation of the will to be proved by affidavit under this Rule.†

In Admiralty actions *in rem*, if the plaintiff makes default in pleading, the evidence may be ordered to be taken by affidavit, independently of the present Rule.‡

Rule 2.

Upon any motion, petition, or summons, evidence may be given by affidavit; but the Court or a Judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

This Rule is a re-enactment of Rule 37 of the Principal Act, the words, "motion, petition, or summons," being substituted for "interlocutory application."

This Rule is copied almost *verbatim* from the recommendations of the Judicature Commission, the words, "any motion, petition, or summons," being substituted for "interlocutory applications."§ See, also, 15 and 16 Vict. c. 86, s. 40.

Leave cannot be given to cross-examine witnesses in Court on interlocutory applications; the witnesses can only be ordered to be in attendance for cross-examination if it appear necessary. Per Jessel, M.R.||

Rules 2 and 3 of this Order, as to cross-examining witnesses, do not apply to the cross-examination of the parties to the cause.¶

Rule 3.

Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every

* W. N., 1876, p. 153; 11 N. C., 95.

† *Cook v. Tomlinson*, 24 W. R., 851; 35 L. T., 431; 25 W. R., 62.

‡ *The "Sfactoria"*, 2 P. D., 3. The Admiralty Court Rules, 1859, Rules 75, 88, 105, would apply under section 18 of this Act.

§ First Report, p. 14.

|| *In Re Natyglo and Blaina Ironwork Company*, 10 N. C., 195: 1 Charley's Cases (Court), 137.

¶ *Storer v. Simmons*, 2 Charley's Cases (Chambers), 65. Per Lindley, J.

Ord. XXXVII., affidavit which shall unnecessarily set forth matters of
Rule 3. hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same.

This Rule is a re-enactment of Rule 35 of the Principal Act.

A distinction is here very properly drawn between evidence on affidavit, which is to replace *voir dire* examination in open Court, and mere affidavits in support of motions and summonses, and other interlocutory proceedings. The law here enacted as to the latter is identical with that laid down by Mr. Day, in reference to affidavits in support of interlocutory motions at Common Law:—"When facts are not within the deponent's knowledge, he should allege that he has been informed thereof, or that he verily believes them to be true. Thus, where it is from the circumstances clearly impossible to swear positively—as where the cause of action arose from nonpayment of bills in India—it is considered sufficient to state that the bills were not paid to deponent's knowledge and belief."*

The second clause of this Rule is taken from Order XL. of the Consolidated Orders of the Court of Chancery, Rules 9 and 10.

See, as to costs, the Rules of the Supreme Court (Costs), Special Allowances and General Provisions, § 18, *infra*.

Rule 4.

The Court or a Judge may, in cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct.

This Rule is a re-enactment of the last clause of Rule 45 of the Principal Act.

A similar power was given by ss. 46 and 47 of the Common Law Procedure Act, 1854, to the Common Law Courts and Judges. And see 1 Wm. IV. c. 22, s. 4.

As to printing depositions, see the Rules of the Supreme Court (Costs), Orders I. to V., *infra*.

"Any officer of the Court" includes the existing examiners in Chancery, appointed under 16 & 17 Vict. c. 22, whose offices are clearly saved by s. 77 of the Principal Act.† See, also, Rule 1 of this Order, *supra*.

* Common Law Procedure Acts, p. 52, citing *Hobson v. Campbell*, 1 H. Black., 245.

† *In Re Springall and Goldsack's Contract*, W. N., 1875, p. 225. Per Jessel, M.R.

An application for the examination of a witness under this Rule may be made *ex parte* on an affidavit of the solicitor to the party applying, to the effect that the witness is a "necessary and material" one on behalf of his client, and is unable to give evidence in open Court for some specified reason.*

**Ord. XXXVII.
Rule 4.**

"May order any deposition to be filed." In *Bolton v. Bolton*,† Hall, V.C., ordered a deposition to be filed, although it was not in the examiner's handwriting, as the examination took place in the presence of the advisers of the opposite party, who cross-examined the witness, and the examiner certified that the deposition had been read over to the witness and signed by him in his presence.

ORDER XXXVIII.

EVIDENCE BY AFFIDAVIT.

Rule 1.

Within fourteen days after a consent‡ for taking evidence by affidavit as between the plaintiff and the defendant has been given, or within such time as the parties may agree upon, or a Judge in chambers may allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof.

"Within fourteen days." This was the time within which the plaintiff or defendant might apply after issue joined, that the evidence be taken *viva voce* at the hearing of the cause, instead of before an examiner.§ Evidence by affidavit was, however, permissible after issue joined, instead of before an examiner.|| The evidence is to be closed before notice of trial is given.

"A consent for taking evidence by affidavit, as between the plaintiff and defendant." This consent is "the agreement between the parties" referred to in Order XXXVII., Rule 1, *supra*. It must be a formal consent in writing.¶

A guardian *ad litem* can consent, on behalf of infant defendants, to the evidence being taken by affidavit,** and no order of the Court is necessary to enable him to do so.††

Although, as a rule, trustees who are made parties to a Chancery suit

* Coe's Practice of the Judges' Chambers, 109. See Chitty's "Forms," 173, etc.

† 2 Ch. D., 217; 34 L. T., 123; 24 W. R., 426.

‡ "I hope," said Hall, V.C., in *The Attorney-General v. The Pagham Harbour Reclamation Company*, W. N., 1876, p. 94, "that the evidence in all actions will, as far as possible, be taken by affidavit."

§ Order of 5th February, 1861, Rule 3. But see Rule 10 of the same Order.

|| Rule 5 of the same Order.

¶ *The New Westminster Brewery Company v. Hannah*, 1 Ch. D., 278; 24 W. R., 137; 1 Charley's Cases (Court), 138. Per Hall, V.C.

** *Knatchbull v. Fowle*, 1 Ch. D., 604; 24 W. R., 901; *Fryer v. Wiseman*, 45 L. J. (Ch.), 199; 33 L. T., 779; 24 W. R., 205.

†† *Fryer v. Wiseman*, *ubi supra*.

Or. XXXVIII., Rule 1. are allowed their costs, trustees who refused to consent to the evidence being taken by affidavit, and thereby prevented the evidence from being so taken, were fined by Bacon, V.C., in the costs of an application by the opposite party to Malins, V.C., to have the evidence so taken, the suit having been begun under the old Chancery practice, and considerable expense having been incurred in the preparation of affidavits before the 1st of November, 1875.*

"Within such time as a Judge at chambers may allow." This refers more particularly to a case in which the Judge has, under Order XXXVII., Rule 1, "for sufficient reason" *ordered*† that any particular fact or facts shall be proved by affidavit.

N.B.—Affidavits which merely echo the statement of claim, the deponent having no personal knowledge of the matters deposed to, cannot be used at the hearing, and the costs of them will be disallowed. Per Jessel, M.R.‡

Rule 2.

The defendant within fourteen days after delivery of such list, or within such time as the parties may agree upon, or a Judge in chambers may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof.

"Such list," *i.e.*, the list of affidavits filed by the plaintiff under Rule 1 of this Order, *supra*.

Rule 3.

Within seven days after the expiration of the said fourteen days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof.

"The said fourteen days," *i.e.*, the fourteen days from the delivery of the plaintiff's list of affidavits, within which the defendant, under the last Rule, has delivered his list of affidavits.

"Or such other time as aforesaid," *i.e.*, such time as, under the last Rule, the parties have agreed upon, or as a Judge at chambers has allowed.

In a suit commenced before the 1st of November, 1875, to have a voluntary settlement by the plaintiff set aside, on the ground of fraud and surprise, Bacon, V.C., allowed the plaintiff to use at the hearing affidavits *filed subsequently to the affidavits in reply*, purporting to shew that the plaintiff was suffering from mental incapacity at the time at which she executed the settlement.§

* *Pattison v. Wooler*, 2 Ch. D., 586; 45 L. J. (Ch.), 274; 34 L. T., 41; 24 W. R., 455.

† "The oral examination of witnesses in trials by jury" is protected by section 20 of this Act.

‡ W. N., 1876, p. 59. See Order XXXVII., Rule 3, *supra*.

§ *Roe v. Davies*, 2 Ch. D., 729; 24 W. R., 606.

Rule 4.

Or. XXXVIII.,
Rule 4.

When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination before the Court at the trial, such notice to be served' at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court or a Judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production.

The Rule is copied from the 19th Rule of the Chancery Order of 5th February, 1861. The important little word "not" has, however, been inserted in the last sentence.

"His affidavit shall not be used in evidence." In *Meyrick v. James** the defendants moved that affidavits filed on behalf of the plaintiff be taken off the file, on the ground that the deponent, who had been ordered to attend before the examiners to be cross-examined, had not been produced. It was pointed out that the proper course was to object to the affidavits being read. Jessel, M.R., held that the motion was irregular.

Rule 5.

The party to whom such notice as is mentioned in the last preceding Rule is given shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined.

The Rule is copied from the 21st Rule of the Chancery Order of the 5th February, 1861.

Rule 6.

When the evidence in any action is under this Order

* W. N., 1877, p. 120 ; 12 N. C., 110.

Or. XXXVIII., taken by affidavit such evidence shall be printed, and the
Rule 6. notice of trial* shall be given at the same time or times
 after the close of the evidence as in other cases is by these
 Rules provided after the close of the pleadings.

As to notice of trial, see pp. 432-3.

The direction as to printing is taken from the 1st Rule of the Chancery Order of the 16th May, 1862.

By the Vth Order of the Rules of the Supreme Court (Costs), elaborate provision is made for the printing of affidavits and the supply of copies at a cheap rate. One of the directions is, that the affidavit is to be printed by the party on whose behalf it is taken, and in the manner provided by Rule 2 of Order LVI., *infra*.†

By Rule 3 of that Order an affidavit may be *sworn to* either in print or in manuscript, or partly in print and partly in manuscript.

The requirement of this Rule that when the evidence in any action is taken by affidavit, under this Order, it must be printed, was dispensed with by Hall, V.C., with the consent of both parties, in the case of *The Attorney-General v. The Pagham Harbour Reclamation Company*,‡ in which, before the action was turned into an information and action, the whole of the plaintiff's evidence in chief, and also part of the defendant's evidence, had been taken by affidavit.

ORDER XXXIX.

MOTION FOR NEW TRIAL.

Rule 1.

A party desirous of obtaining a new trial of any cause tried in the Queen's Bench, Common Pleas, or Exchequer Divisions on which a verdict has been found by a jury, or by a Judge without a jury, must apply for the same to a Divisional Court by motion for an order calling upon the opposite party to show cause at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made within four days after the trial, if the Divisional Court is then sitting, or within the first four days after the commencement of the sitting of the Divisional Court next after the trial, or within such extended time as the Court or a Judge may allow.

"Shall be made within four days." By Reg. Gen. Hil. T., 1853, Rule 50, "No motion for a new trial shall be allowed after the expiration of four days from the trial, nor in any case after the expiration of the term, if the case be tried in term, or after the expiration of the first four days of the ensuing term, when the cause is tried out of term, unless entered in a list of postponed motions by leave of the Court."

* As to notice of trial, see Order XXXVI., Rules 3 to 15, *supra*.

† The Rules of Order V. of the Rules of the Supreme Court (Costs), numbered 9 to 14 (inclusive), relative to supplying written copies of affidavits to the opposite party, are taken *verbatim* from Order XXXVI. of the Consolidated Orders of the Court of Chancery.

‡ W. N., 1876, p. 94; *Times*, Monday, February 21st, 1876.

The distinction between sittings within term and out of term are abolished by s. 26 of the Principal Act, so far as relates to the administration of justice. The curious and remarkable rule that if the action were tried in term, the rule must be moved for in term has no counterpart in the new practice, but "the first four days of the sitting of the Divisional Court next after the trial" answer, to some extent, to "the first four days of the ensuing term."*

Ord. XXXIX,
Rule 1.

Leave to vary the stereotyped time of application is still preserved by the present Rule, but there is no allusion to any "list of postponed motions."

The Judicature Commission recommended† that "the time within which an application must be made for a new trial should be regulated by General Orders of the Supreme Court."

The Courts were very rigid in adhering to the time limited by the Reg. Gen. Hil. T., 1853,‡ but, under very peculiar circumstances, they would allow the motion to be made at any time before judgment was actually signed.§

In *Hallums v. Hills*,|| a verdict was given for the plaintiff at the Maidstone Summer Assizes, on Tuesday, the 11th of July, 1876. The defendant was desirous of moving for a new trial under the present Rule, which specifies two different states of circumstances under which the application may be made:—(1) the Divisional Court may be sitting at some time within the four days after the trial, in which case the application must be made within those four days; or (2) the Divisional Court may not be sitting within the four days next after the trial, in which case the application must be made within the first four days after the commencement of the sitting of the Divisional Court next after the trial. In *Hallums v. Hills* the Divisional Court did not sit, after the trial, till the 17th of July, and, consequently, did not sit "within four days after the trial." The first alternative, therefore, did not apply. The next sitting after the 17th was on the 24th of July. No application was made by the defendant on the 17th, and, on his applying on the 24th, he was told by the Divisional Court that he was too late, as the sittings had "commenced," in view of the present Rule, on the 17th, and the motion ought to have been made on that day! The defendant, according to the Divisional Court, had thus only one day on which to move! The Court of Appeal upset this remarkable decision, and decided that the "four days," within which, in the second alternative, the defendant in an action tried on Circuit had power to move, meant four days on which the Divisional Court was *actually* sitting.

Immediately after the decision in *Hallums v. Hills* applications were made to the Divisional Court in *Pondenson v. Planque*,¶ *Allgood v. Gibson*,** and *Appleyard v. Yates*,†† for new trials of actions tried at the Summer Assizes of 1876. In *Pondenson v. Planque* the action was tried on the 22nd of July, 1876. The next Divisional Court sat on the 24th of July. There were also sittings on the 25th and 31st of July, and the 1st of

* As to the "sittings" of the Courts, see Order LXI., *infra*.

† First Report, p. 15.

‡ *Ellaby v. Moore*, 22 L. J. (C. P.), 253.

§ *Rex v. Gough*, 2 Doug., 797; *Birt v. Barlow*, 1 Doug., 171.

|| 24 W. R., 956; W. N., 1876, p. 237; 46 L. J. (Q.B.), 88.

¶ *Times*, Wednesday, August 2nd, 1876.

** *Times*, Tuesday, August 8th, 1876.

†† *Ibid*.

Ord. XXXIX., August. On the 1st of August the application for a new trial was made, and the Divisional Court held that the application was in time. This decision appears to have been clearly wrong, as the Divisional Court actually sat "within four days after the trial," and the application ought to have been made on the 24th or 25th of July. Lord Coleridge, C.J., and Kelly, C.B., understood the word "then" in the present Rule to mean "on the fourth day after the trial," and as the Divisional Court was not sitting on the 26th of July, the fourth day after the trial, the first alternative of the present Rule did not apply, and, as the application was made on the fourth day on which the Divisional Court actually sat after the trial, it was in time, according to the *dictum* of Lord Coleridge. It is submitted that the word "then" in the present Rule ought to mean "within the first four days after the trial."

In *Allgood v. Gibson* the action was tried on the 13th of July, 1876. The next Divisional Court was on the 17th of July, and there were also sittings, as we have seen, on the 24th, 25th, and 31st of July. The application for a new trial was made on the 31st, and the Divisional Court held that it was too late, and there can be little doubt that this decision was correct, whether the construction of the word "then," which Lord Coleridge, C.J., and Kelly, C.B., contended for, i.e., "the fourth day after the trial," or the construction which the writer contends for, "any time within four days after the trial," be accepted as sound.

In *Appleyard v. Yates* the action was tried on the 19th of July, 1876. The Divisional Court sat, as we have seen, on the 24th, 25th, and 31st of July, and on the 1st of August. On the 31st of July the application was made for a new trial, and the Divisional Court held that it was too late. This decision was clearly wrong, whichever construction of the word "then" is accepted, as there was no Divisional Court sitting either at any time within four days of the trial or on the fourth day after the trial. The second alternative therefore applied, and the motion was made on the third day on which the Divisional Court actually sat, and so was in time. The necessity for some relaxation of the present Rule in the case of applications for new trials, where the action had been tried at the Assizes, became pretty clear, and, accordingly, the present Rule was repealed by the Rules of the Supreme Court, December, 1876, and new provisions were substituted for it.*

Rule 1a.

Order XXXIX., Rule 1, is hereby repealed, and instead thereof the following provision shall take effect:—

Where, in an action in the Queen's Bench, Common Pleas, or Exchequer Division, there has been a trial by a jury, any application for a new trial shall be to a Divisional Court. And where the trial has been by a Judge without a jury, the application for a new trial shall be to the Court of Appeal.

This new Rule was added by Rule 5 of the Rules of the Supreme Court, December, 1876.

* See Rules 1a and 1b of this Order, *infra*.

"A Divisional Court." Under the old practice, the application was made in the Court in which the action was pending. But under this Act, all actions except those in inferior Courts, will be commenced in *one Court*, the High Court of Justice, and the Divisional Courts will be part of that Court. See ss. 40 & 41 of the Principal Act, *supra*.

Ord. XXXIX.,
Rule 1a.

Dr. Stephen points out * that this provision of applying to "a Divisional Court" is in analogy to the practice which has hitherto required an application for a new trial to be made to the Court in *banc*."

The necessity for holding Divisional Courts has been greatly diminished by section 17 of the Appellate Jurisdiction Act, 1876, which provides that "all business arising out of every action shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single Judge." Motions for new trials in the Common Law Divisions form an exception to this Rule.

Prior to the passing of the Appellate Jurisdiction Act, 1876, Sir J. Hannen, the President of the Probate Division, intimated, in the case of *Jollands v. Jollands*,† that an application for a rule *nisi* for a new trial of a case tried before him must be made to a Divisional Court, consisting of himself, Sir Robert Phillimore, and a Judge of one of the other Divisions.

In the Chancery Division application is still to be made to the Judge before whom the action is set down.‡

"By a Judge without a jury." Under Rule 1 the application for a new trial, where the trial had been held before a Judge without a jury, in the Common Law Divisions, was made to the same tribunal as the application for a new trial, where there had been a jury trial. The practice was altered by this new Rule. The application, where the trial has been held before a Judge without a jury, must now be made to the Court of Appeal direct, and not by way of appeal from a Divisional Court.§

Rule 1b.

Applications for new trials shall be by motion,|| calling on the opposite party to show cause,¶ at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed.

Such motion shall be made within the times following, unless the Court or a Judge shall enlarge the time:—
An application to a Divisional Court for a new trial, if the

* 3 Steph. Comm., 561, 562, 7th edn.

† *Times*, Wednesday, March 1st, 1876. "Divisional Courts may be held for the transaction of any part of the business assigned to the Probate Division which the Judges of the said Division, with the concurrence of the President of the High Court, deem proper to be heard by a Divisional Court." Section 44 of the Principal Act.

‡ Per Baggallay, L. J., in *Warner v. Murdoch*, *Murdoch v. Warner*, 4 Ch. D., 750, 755.

§ *Oastler v. Henderson*, 12 N. C., 121.

|| The words "for an order" should be here understood. These words are inserted in Rule 1, *supra*. See, also, the note to Rule 2, *infra*.

¶ See *Foster v. Roberts*, W. N., 1877, p. 11; 12 N. C., 3.

Ord. XXXIX., trial has taken place in London or Westminster, shall be
 Rule 1b. made within four days after the trial,* or on the first subsequent day on which a Divisional Court to which the application may be made shall have actually sat to hear motions. If the trial has taken place elsewhere than in London or Middlesex, the motion shall be made within the first four days of the next following sittings.

This new Rule was added by Rule 6 of the Rules of the Supreme Court, December, 1876.

The first paragraph of the Rule is a re-enactment of part of Rule 1 of this Order, *supra*.

The second paragraph of this Rule is substituted for the following portion of Rule 1 :—"Such motion shall be made within four days after the trial, if the Divisional Court is then sitting, or within the first four days after the commencement of the sitting of the Divisional Court next after the trial, or within such extended time as the Court or a Judge may allow."

Although the words at the end of Rule 1, "or within such extended time as the Court or a Judge may allow," are omitted in the present Rule, a discretion will still be left in the Court or a Judge, under Order LVII., Rule 6, to enlarge (upon terms) the time for applying, by the insertion, at the commencement of the second paragraph of the present Rule, of the words, "unless the Court or a Judge shall enlarge the time."

It will be observed that a distinction is drawn in the present Rule between applications for new trials in the case of actions tried in London or Middlesex and in the case of actions tried "*elsewhere*," i.e., upon Circuit. In the case of actions tried in London or Middlesex, the application must be made within four days after the trial, or on the first subsequent day on which "the proper Divisional Court shall have ACTUALLY sat to hear motions."

If the Divisional Court does not actually sit to hear motions till after the "four days" next† "after the trial" have expired, it would evidently be impossible to apply to it "within" the "four days" next "after the trial." The second alternative is intended to provide for such a case, and it is quite clear that if the first subsequent day on which the Divisional Court actually‡ sits is distant a week, a fortnight, or a month from the trial of the action, still the application can be made to the Divisional Court on that "first subsequent day."

Suppose, on the other hand, that the Divisional Court actually sits on the second day after the trial, what course must the party desirous of moving for a new trial pursue? He need not apply on that day, if the Divisional Court actually sits on the third or fourth day after the trial, but if the party fails to apply on the second day, and the Divisional Court

* After the discharge of the jury. *Shaw v. Hope*, 25 W. R., 729.

† This word must clearly be "understood" here.

‡ The introduction of the word "*actually*" is, no doubt, due to the decision in *Hallums v. Hills*, 24 W. R., 956; W. N., 1876, p. 237; 46 L. J. (Q.B.), 88. See this case epitomized under Rule 1 of this Order, *supra*.

does not actually sit again *till after the four days have expired*, it is evident that the party's right to apply for a new trial will be gone. Ord. XXXIX.,
Rule 1b.

In the case of a trial on Circuit, the application must be made, under this new Rule "within the first four days of the next following sittings." The object of allowing a more extended time, in the case of trials on Circuit, was, it is believed, to meet the difficulties raised in the case of *Hallums v. Hills*,* in which Mellish, L.J., showed that it might be impossible to move for a new trial in a case tried on Circuit, if the words in the old Rule, "within four days after the commencement of the sitting of the Divisional Court next after the trial," were to be taken literally.

In delivering judgment in *Hallums v. Hills*, Mellish, L.J., said: "Suppose the Divisional Court sat on a Tuesday, and a case was tried on Monday at a place a long way from London, such as Leeds, and the verdict was not given till six in the evening—it would be practically impossible to move before the Divisional Court on the Tuesday, and if it did not sit [again] till the following Tuesday, there would never, if the decision appealed from is right, be an opportunity of moving at all."

In *Scarf v. The General Steam Navigation Company*,† in which judgment had been entered for the plaintiff, a rule *nisi* for a new trial, obtained by the defendant under the present Rule, and a motion, by the defendants, for judgment under Order XL., Rule 2, *infra*, were directed by the Queen's Bench to come on together—the defendant's Counsel to begin.

As the Court of Appeal has "all the power, as to amendment and otherwise, of the Court of First Instance,"‡ it can enlarge the time for moving for a new trial.§

Where a verdict had been found against A. B., and in favour of C. D., and A. B. obtained a rule *nisi* for a new trial, on the ground that the verdict was against the weight of evidence, and the rule *nisi*, by direction of the Court of First Instance, was served on C. D., and, on argument, was discharged, on appeal against this decision by A. B., the Court of Appeal held that it had jurisdiction to call upon C. D. to show cause why a new trial should not be granted as to him, although no new trial had been moved for, as to him, in the Court of First Instance, and the time for moving for it had long since elapsed. The Court of Appeal, on C. D. showing cause, made the rule absolute generally for a new trial.||

Rule 2.

A copy of such order shall be served on the opposite party within four days from the time of the same being made.

This Rule is in accordance with the former practice, that notice must be served on the attorney of the opposite party when the motion was entered on the list of postponed motions, or was postponed, in the case of a cause tried in term, by leave of the Court.¶ But the notice must, in future, be given in all cases, and within four days.

* 24 W. R., 956; W. N., 1876, p. 237; 46 L. J. (Q.B.), 88.

† W. N., 1876, p. 83.

‡ Order LVIII., Rule 5.

§ *Purnell v. The Great Western Railway Company and Harris*, 1 Q. B. D., 636; 45 L. J. (Q.B.), 637; 34 L. T., 822; 24 W. R., 909.

¶ *Purnell v. The Great Western Railway Company and Harris*, *ubi supra*.

¶ Reg. Gen. Hil. T., 1853, Rule 53. See *Doe d. Whitty v. Carr*, 16 Q. B., 117.

Ord. XXXIX., "Such order," i.e., the order "calling upon the opposite party to show
Rule 2. cause why a new trial should not be directed." The word "such" is rendered a little obscure by the omission, in Rule 1b, of the words "for an order," which occur in Rule 1, before the words "calling upon the opposite party."

Rule 3.

A new trial shall not be granted on the ground of misdirection or the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only.*

This Rule is a re-enactment of Rule 48 of the Principal Act.

Where, under the former practice, there was a misdirection on a point immediately in issue, and for which a bill of exceptions would lie, a new trial was a matter of right *ex debito justitiæ*.†

Bills of exceptions are, however, abolished by Order LVIII., Rule 1, *infra*, and under the new practice there will, it would seem, be no new trials, as a matter of right.

The whole tendency of this legislation is to place the suitor as much as possible in the hands of the Judge, as in Courts of Equity, with a view to finality in legal proceedings.‡

The Court has always had larger powers of refusing a new trial, in the case of the admission or rejection of evidence, than in that of misdirection, as the former is not likely so directly to influence the verdict as the latter; but if a Judge admitted improper evidence,§ or rejected evidence which ought to have been admitted,|| the Court would, in general, grant a new trial.¶ With regard to the concluding portion of this Rule, where, under the old practice, a party was entitled *ex debito justitiæ* to a new trial upon *one of several* issues, the Court could not confine the new trial to such issue only, but must have granted it upon *all* the issues.** But if the granting of the new trial upon one of several issues was a matter in the discretion of the Court, it might have been granted upon such one issue only.††

* See *Marsh v. Isaacs*, 45 L. J. (C.P.), 505, epitomized under the next Rule.

† Archbold's Practice, p. 1519.

‡ As poor Lord Kenyon used to say, "*Est modus in rebus*—there must be an end of things."

§ *Tutton v. Andrews*, Baines, 448. || *Smedley v. Hill*, 2 W. Bl., 1105.

¶ See *Robinson v. Williamson*, 9 Price, 136.

** *Earl of Macclesfield v. Bradley*, 7 M. & W., 570.

†† *Ibid.*; *Hutchinson v. Piper*, 4 Taunt., 555.

In *Earp v. Faulkner** the Court of Appeal held that a rule *nisi*, obtained before the 1st of November, 1875, on the ground of improper admission of evidence, ought to be discharged, because there was no "substantial wrong or miscarriage" occasioned by the admission, within the meaning of the present Rule. In this case a certificate of a previous conviction had been improperly read in evidence against one of the defendants, but it did not influence the verdict.

Ord. XXXIX.
Rule 3.

In *Milissich v. Lloyds*† the Court of Appeal ordered a new trial, on the ground that Lord Coleridge, C.J., in an action for libel, ought to have left it to the jury to say whether the report of a trial published by the defendants was a fair one or not, instead of directing them that the report was unfair in containing only part of the case.

Rule 4.

A new trial may be ordered on any question in an action, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question.

Formerly, as we have seen,‡ the Court could not, where the party was entitled to a new trial *ex debito justitiæ*, confine the new trial to the particular issue wrongly decided, but must have granted it as to all the issues. This Rule enables the Court in all cases to grant a new trial, although the misdirection, &c., affect all the issues, and to confine the new trial to one of them.

When the issues in an action are separate and distinct it is competent to the Judge, in his discretion, without the consent of the parties, to accept the verdict of the jury on any issue or issues on which they are able to agree, and to discharge the jury on any issue or issues on which they are unable to agree, and to give judgment on the decided issues. The undecided issues can, in that event, be sent down to a new trial.§

Rule 5.

An order to show cause shall be a stay of proceedings in the action, unless the Court shall order that it shall not be so as to the whole or any part of the action.

This is a salutary enactment. The Order to show cause is to be *ipso facto*, so soon as made, a stay of proceedings. Formerly the opposite party might have signed judgment, and even issued execution, notwithstanding the order to show cause; but by 1 Wm. IV. c. 7, s. 4, the Court might have ordered the judgment to be vacated, or the execution to be stayed, and have granted a new trial, the party being restored *in integrum*, a very circuitous

* 34 L. T., 284; 24 W. R., 774; W. N., 1876, 181; 1 Charley's Cases (Court), 153.

† 36 L. T., 423.

‡ See the note to the last Rule.

§ *Marsh v. Isaacs*, 45 L. J. (C.P.), 505.

Ord. XXXIX.,
Rule 5. proceeding. The proper course, it was said, where judgment had been signed, was "to move promptly to set it aside."* This race, which was hardly becoming, will be no longer necessary.

ORDER XL.

MOTION FOR JUDGMENT.

Rule 1.

Except where by the Act, or by these Rules, it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment.

In the Court of Chancery there was a form of proceeding called "motion for decree" (made, however, before replication), from which the idea of "motion for judgment" seems to have been derived.† At Common Law a "rule for judgment" was once necessary.

"Except where by the Act or by these Rules it is provided that judgment may be obtained in any other manner." In the case of writs *specially indorsed*, unless the defendant obtains leave to defend, under Order XIV., *supra*, the plaintiff will be empowered by the Judge, at chambers, to sign judgment at once. Motion for judgment is not necessary where either final or interlocutory judgment is entered for *want of appearance* under the provisions of Order XIII., or for *want of pleading* under the provisions of Order XXIX. The right to enter judgment in these cases is complete when the opposite party is *in default*. After trial the Judge may, by Order XXXVI., Rule 22a, direct that judgment be entered for any party, and in this case judgment will, *as a matter of course*, be entered in favour of the party in whose favour the verdict of the jury is given. Judgments under the County Court Acts are excepted.‡

A plaintiff may sign judgment for his costs, if they are not paid within twenty-four hours after the defendant has paid money into Court (Order XXX., Rule 4); and a defendant may sign judgment for his costs, where the plaintiff discontinues the action (Order XXIII.), or confesses a plea *puis darrein continuance* (Order XX., Rule 3).

In the Chancery Division, the Master of the Rolls and the Vice-Chancellors have given directions that motions for judgment in actions shall not be brought on as ordinary motions, but SHALL BE SET DOWN IN THE CAUSE BOOK.§

"They can be marked 'Short,' on production of the usual certificate of Counsel, and will then be placed in the paper on the first short-cause day after the day for which notice is given. If not marked 'Short,' they will come into the general paper in their regular turn.

"It will be advisable that the notices of motion for judgment should, if it is intended to mark them 'Short,' contain a statement to that effect, and also a statement that no further notice will be given of their having

* *Doe d. Whitby v. Carr*, 20 L. J. (Q.B.) 83.

† See the chapter on "motion for decree" in Daniel's Chancery Practice. ‡ *Scutt v. Freeman*, 2 Q. B. D., 177; 46 L. J. (Q.B.), 173.

§ Motions under Rule 11 of this Order form an exception.

been so marked. Such statement will dispense with the necessity for giving defendants further notice that motions for judgment have been marked 'Short.'

Order XL.,
Rule 1.

"As notice of trial can only be given after issue joined, the proper course where there are no pleadings, is to set the action down on motion for judgment under the present Rule."*

As to notices of motion for judgment in the Chancery Division, under Order XXIX., Rule 10, see the cases cited in the note to that Rule.

In the Common Law Divisions, motions for judgment are set down at the bottom of the new trial paper.† Where parties move for a new trial, and also to enter judgment, the motions may come on together.‡

Rule 2.

Where at the trial of an action the Judge or a Referee has ordered that any judgment be entered subject to leave to move, the party to whom leave has been reserved shall set down the action on motion for judgment, and give notice thereof to the other parties within the time limited by the Judge in reserving leave, or, if no time has been limited, within ten days after the trial. The notice of motion shall state the grounds of the motion, and the relief sought, and that the motion is pursuant to leave reserved.

The Judicature Commission recommended§ that "when the Judge at the trial has reserved any question of law, he should have power to direct the cause to be set down for argument before the Court *without motion for a rule nisi*."

Instead of moving for a rule *nisi* and then calling upon the opposite party to show cause, the party is, under the present Rule, within *ten days* of the trial, to "set down the action on motion for judgment," and serve the opposite party with notice of the motion, and the ground of the motion and the relief sought are to be stated. The opposite party will therefore show cause, in the first instance. See, also, Order LIII., Rule 2, *infra*, and the note thereto.

"Subject to leave to move." These words, when originally inserted in this Rule, had a distinct reference to the powers conferred on the Judge at the trial, by Order XXXVI., Rule 22, *supra* :—"Upon the trial of an action the Judge may direct that judgment be entered for any or either party, either *with* or *without leave* to any party *to move* to set aside or vary the same, or to enter any other judgment." This was

* W. N., 1876, (Notices) p. 233, cited *infra*.

† *Lindsay v. Cundy*, *Times*, November 16th and 18th, and December 14th, 1875; 1 Charley's Cases (Court), 139, 141.

‡ *Scarf v. The General Steam Navigation Company*, W. N., 1876, p. 83.

§ First Report, p. 15.

**Order XL.,
Rule 2.**

called "leave reserved." The policy of the 17th section of the Appellate Jurisdiction Act, 1876, led to the omission from Rule 22 of Order XXXVI., of the words, "either with or without leave," etc., and the substitution for them of the words, "or adjourn the case for further consideration," the object being that "all proceedings in an action down to and including final judgment," should "be taken before the Judge before whom the trial took place," and that the *quasi*-appeal to the Court in *banc* or to the Divisional Court should be done away with.

The right to "reserve any case or any point in a case for the consideration of a Divisional Court," is, no doubt, preserved by s. 46 of the Principal Act; but then that section is repealed by s. 17 of the Appellate Jurisdiction Act, 1876, so far as it is "inconsistent with the provisions" of that section, which, however, only requires "all business arising out of any action" to be disposed of by a "single Judge," "so far as is practicable and convenient." Arguments of "cases or of points in cases" are not among the "proceedings and matters to be heard and determined" before Divisional Courts under Order LVIIa; but, taking the words "so far as is practicable and convenient," in s. 17 of the Appellate Jurisdiction Act, 1876, in connection with *the retention of the present Rule*, it seems clear that it was not intended by the Legislature *entirely* to abolish the ancient practice of moving the Court in *banc* upon leave reserved at the trial.

In *Scarf v. The General Steam Navigation Company*,* the Queen's Bench directed that notice of motion for judgment under this Rule, and an order nisi for a new trial under Order XXXIX., Rule 1, should come on together.

Rule 3.

Where at the trial of an action the Judge or Referee† abstains from directing any judgment to be entered, the plaintiff may set down the action on motion for judgment. If he does not so set it down and give notice thereof to the other parties within ten days after the trial, any defendant may set down the action on motion for judgment, and give notice thereof to the other parties.

See Rule 7 of this Order and note to last Rule.

"Abstains from directing any judgment to be entered." "Abstaining from directing" seems equivalent to directing that judgment shall not be entered. The words, "the Judges may also, after the trial, direct judgment not to be entered," in Order XXXVI., Rule 22, were subsequently omitted from that Rule. The words which followed, "leave any party to move for judgment," were, however, retained, and it is to the power so conferred on the Judge of "leaving the party to move for judgment," that the words of the present Rule, "abstains from directing any judgment to be entered," now probably refer.

* W. N., 1876, p. 83.

† *I.e.*, under the new Acts, not an arbitrator. *Lloyd v. Lewis*, 2 Ex. D., 7; 46 L. J. (Ex.), 81; 35 L. T., 539; 25 W. R., 102.

Rule 4.

**Order XL.,
Rule 4.**

Where, at the trial of an action before a jury, the Judge has directed that any judgment be entered, any party may, without any leave reserved, move to set aside such judgment, and enter any other judgment, on the ground that the judgment directed to be entered is wrong, by reason of the Judge having caused the finding to be entered wrongly, with reference to the finding of the jury upon the question or questions submitted to them.

See Order XXXVI., Rule 22, and Order XXXIX., Rule 1, *supra*.

Under the old practice any party might have applied to the Court or Judge to amend the *postea*.^{*} A Judge's direction as to the settlement of the *postea* according to his notes of trial could not, however, have been questioned in the Court above.[†]

This Rule is annulled by Rule 4a of this Order, *infra*. It is re-enacted almost *verbum verbo*,[‡] however, in that Rule. The application is, however, to be made to the Court of Appeal, instead of being made to a Divisional Court of the High Court of Justice; and this is effected by the repeal of Rule 6 of this Order, *infra*, and the substitution for it of the concluding paragraph of Rule 4a:—"An application under this Rule shall be to the Court of Appeal."

Rule 4a.

Order XL., Rules 4 and 6, are repealed, and Rule 5 is repealed so far as it affects trials before a Judge; and the following Rule shall be substituted for Rule 4:—

Where, at or after the trial of an action by a jury, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment, and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the Judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them.

Where, at or after the trial of an action before a Judge, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong.

^{*} Archbold's Practice, 462, *et seq.*

[†] *Sandford v. Alcock*, 10 M. and W., 689; *Newton v. Harland*, 9 Dowl., 65; *Kilner v. Bailey*, 5 M. and W., 382.

[‡] With the exception of the substitution of the word "apply" for "move."

Order XL.,
Rule 4a.

An application under this Rule shall be to the Court of Appeal.

This Rule was added by Rule 17 of the Rules of the Supreme Court, December, 1876.

The first paragraph of the new Rule is a re-enactment, almost for word, of the repealed Rule 4 of this Order, *supra*. The second paragraph of the new Rule is a re-enactment of Rule 5 of this Order, with the omission of the words, "or a Referee," and the substitution of the words "at the trial of an action," of the words "at or after the trial of an action before a Judge."

The object of repealing Rule 4 and part of Rule 5, and of re-enacting them as one Rule, was, apparently, to *group together* the cases in which the motion for judgment is in future to be made direct to the Court of Appeal.

Nothing is said in this Rule about the mode of applying to the Court of Appeal, but the practice is now settled. In *Foster v. Roberts*,* in which Lord Coleridge, C.J., who tried the action without a jury, had ordered judgment to be entered for the defendant, and the plaintiff moved the Court of Appeal for a rule *nisi* to show cause why judgment should be entered for the plaintiff, on the ground that the judgment was entered by reason of the Judge having caused the finding to be wrongly entered, the Court of Appeal decided that *the application ought to be by an entry of fourteen days' notice of appeal under Order LVIII., Rules 2 and 4, in the same manner as in cases of appeal from a judgment of a Divisional Court*.

In *Jones v. Davis*,† where judgment had been entered at the trial for the defendant, and the plaintiff moved the Court of Appeal for a rule *nisi* to enter judgment for him, a similar decision was given by the Court of Appeal.

In *Witt v. Parker*,‡ on an interpleader issue, which was tried by Pollock, B., the jury was discharged, and, on motion for judgment by the same learned Judge, he directed judgment to be entered for the defendant. The plaintiff appealed under the present Rule to the Court of Appeal. The Court of Appeal overruled the defendant's objection to appeal, which was that, by Order I., Rule 2, *supra*, "the procedure practice," under the Interpleader Acts, is still in force, and that in these Acts the Judge's decision is final.§

Rule 5.

Where at the trial of an action *the Judge or a Referee* has directed that any judgment be entered, any party may, without any leave reserved, move to set aside such judgment, and to enter any other judgment, on the ground that the finding upon the finding as entered the judgment so directed is wrong.

* W. N., 1877, p. 11; 12 N. C., 3.

+ W. N., 1877, p. 86; 12 N. C., 75; 36 L. T., 415.

‡ 46 L. J. (Q. B.), 450; 25 W. R., 518. See, however, *Deakin v. Shepherd*, 1 Ex. Div., 75; 24 W. R., 322; 34 L. T., 358; 1 Chancery Cases (Court), 173.

§ See s. 17 of the Common Law Procedure Act, 1860.

|| See, as to Referees, ss. 56 to 59, and s. 83, of the Principal Act, and Order XXXVI., Rules 29b to 34, and the notes thereto.

The words, "the Judge or," are now repealed by Rule 4a of this Order, *supra*, the effect of which is to leave the Rule exclusively applicable to the entry of judgment at a trial before a Referee.

**Order XL.,
Rule 5.**

Upon a motion to set aside or vary a judgment as directed to be entered by an Official Referee, an affidavit, or some evidence of what took place at the trial before him, must be produced. The bare statement of the Counsel who makes the motion (although he may have taken part in the trial) is not sufficient.*

The present Rule, so far as relates to trials before Judges, is almost word for word repeated in Rule 4a of this Order, *supra*, but the application is to be to the Court of Appeal.

Rule 6.

On every motion made under either of the last two preceding Rules, the order shall be an order to show cause,† and shall be returnable in eight days. The motion shall be made within four days after the trial if the Divisional Court is then sitting, or within the first four days after the commencement of the sitting of the Divisional Court next after the trial, or within such extended time as a Court or Judge may allow.

This Rule is annulled by Rule 4a of this Order, Rule 7 of the Rules of the Supreme Court, December, 1876. The Rule has not been re-enacted, and with its repeal would seem to fall to the ground the moving for a rule *nisi* in motions for judgment.

As to the method of moving for judgment in the Court of Appeal, see the cases cited under Rule 4a, *supra*.

Rule 7.

Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, the plaintiff may set down the action on motion for judgment as soon as such issues or questions have been determined. If he does not so set it down, and give notice thereof to the other parties within ten days after his right so to do has arisen, then, after the expiration of such ten days, any defendant may set down the action on motion for judgment, and give notice thereof to the other parties.

The present Rule seems to contemplate the trial of particular issues as well as the trial of "the issue," properly so called, in an action. This Rule does not apply to an action sent down to a County Court to be tried under the 19 and 20 Vict. c. 108.‡

* *Stubbs v. Boyle*, 2 Q. B., 124; 46 L. J. (Q. B.), 136.

† See *Robinson v. Robinson*, 24 W. R., 675.

‡ *Scutt v. Freeman*, 2 Q. B. D., 177; 46 L. J. (Q. B.), 173.

Order XL,
Rule 8.

Rule 8.

Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or a Judge for leave to set down the action on motion for judgment, without waiting for such trial or determination. And the Court or Judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other questions of fact.

Under the old practice, the verdict must have been given on all the issues: but the jury might, by consent, have been discharged from finding a verdict as to one or more of the issues.*

By Order XXXVI., Rule 6, *supra*, the Judge may in future order that "one or more questions of fact be tried before the others." The present Rule assumes the exercise of this power by the Judge. The Rule contemplates also the trial of any of these separate questions in any of the modes mentioned in Order XXXVI., Rule 2, *supra*.

The "questions of fact," alluded to in this section, are such as must necessarily arise in the action, not suppositions or assumed facts, or hypotheses.†

Illustrations of the kind of cases falling within the scope of the present Rule have been thus given by Jessel, M.R.:—"Suppose in a patent case there were two issues, novelty and infringement, and that the latter alone was ready to be tried. It might well be convenient to try it first; and, at all events, it must be tried in the action. Another example occurred in a case in which I remember to have been engaged:—The issues were first, whether the plaintiff was heir; secondly, if he was heir, what was the effect of certain deeds. It would have been convenient to have tried the second question first; but that, in the then state of the law, could not be done, because the documents were not all on the bill; now, however, it might be tried first."‡

Rule 9.

No action shall, except by leave of the Court or a

* Archbold's Practice, p. 448.

† *The Republic of Bolivia v. The National Bolivian Navigation Company*, 24 W. R., 361.

‡ *Ib.*

Judge, be set down on motion for judgment after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do.

Order XL.,
Rule 9.

Compare with this Rule Reg. Gen. Hil. T., 1853, Rule 176, which requires a calendar month's notice of intention to proceed, "in all causes in which there have been *no proceedings for one year* from the last proceeding." A plaintiff must have declared within a year (Common Law Procedure Act, 1852, s. 58).

Rule 10.

Upon a motion for judgment, or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly;* or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined and such accounts and inquiries to be taken and made, as it may think fit.

An opportunity must be afforded the opposite party, under Order XXXIX., Rule 1, *supra*, of showing cause, on the argument of a rule *nisi* in the case of a "new trial."

Rule 11.

Any party to an action may at any stage thereof apply to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, be entitled to, without waiting for the determination of any other question between the parties. The foregoing Rules of this Order shall not apply to such applications, but any such application may be made by motion, so soon as the right of the party applying to the relief claimed has appeared from the pleadings. The Court or a Judge may, on any such application, give such relief, subject to such terms, if any, as such Court or Judge may think fit.

The first clause of this Rule is a re-enactment of Rule 40 of the Principal Act.

* See per Brett, L.J., in *Millissich v. Lloyds*, 46 L. J. (C. P.), 404; 36 L. T., 423.

**Order XL.,
Rule 11.**

This Rule is copied from the recommendations of the Judicature Commission:—"We think that either party should be at liberty to apply at any time for such order as he may, upon the admitted facts of the case, be entitled to, without waiting for the determination of any other questions between the parties."

See also Order XXIX., Rule 13, *supra*.

"This Rule is not meant to apply where there is any serious question of law to be argued. There must be such an admission of facts on the pleadings as would clearly shew that the party "is clearly entitled to the order asked for." Per Mellish, L.J., in *Gilbert v. Smith*.*

"Where" [in an action in the Chancery Division] "a defendant makes his defence, and the plaintiff moves under" the present "Rule for such order as he is entitled to on the admissions of the defendant, THE ACTION NEED NOT BE SET DOWN, but if, on the motion being made, it appears that there must be a discussion or argument, it may be ordered to go into the General Paper, subject to any order for its being advanced."†

"The exercise of the power given by this Rule is a matter which must depend on the discretion of the Judge, who may think that the question before him is too difficult to be decided on a motion for judgment on an ordinary motion day." Per Jessel, M.R., sitting as President of the Court of Appeal, in *Mellor v. Sidebottom*.‡

"The relief claimed." A defendant seeking to *dismiss* an action for default of pleading is not a party claiming "relief" within the meaning of this Rule.§

In *Gillott v. Kerr*,|| Jessel, M.R., decided that making default in delivering a defence in the terms of Order XXIX., Rule 10, was not an "admission of facts in the pleadings" within the meaning of the present Rule.

An order cannot be made, on motion under the present Rule, for an account of what is due on a *counterclaim* on which the plaintiff has joined issue generally (instead of replying to it specially¶), the balance mentioned in Order XXII., Rule 10, being the balance found to be due, at the hearing, on going into the plaintiff's claim as well as the defendant's counterclaim.**

In a suit to take the accounts of a partnership, commenced before the 1st of November, 1875, in which the defendants, by their answer, *admitted* the partnership, and that they had not accounted, but alleged that the plaintiff had not accounted to them, and that moneys were payable to them by the plaintiff, upon which issue was joined, Hall, V.C., made an order for an account before the hearing, upon motion by the plaintiff, under the present Rule.††

* 2 Ch. D., 686; 45 L. J. (Ch.), 514; 35 L. T., 43; 24 W. R., 568.

† Chancery Registrar's Notice, December, 1876, W. N., 1876 (Notices), p. 233, cited *infra*. As to the "General Paper," see the note to Rule 1 of this Order, *supra*.

‡ 5 Ch. D., 342; 46 L. J. (Ch.), 398; 25 W. R., 401.

§ *Litton v. Litton*, 3 Ch. D., 793; 24 W. R., 962. Per Hall, V.C.

|| 24 W. R., 428. See, further, the cases cited under Order XXIX., Rule 10, *supra*.

¶ And which must therefore be "taken to be *admitted*." Order XIX., Rule 17.

** *Rolfe v. Maclaren*, 3 Ch. D., 106; 24 W. R., 816; and see *Aitken v. Dunbar*, 46 L. J. (Ch.), 489.

†† *Turquand v. Wilson*, 1 Ch. D., 85; 45 L. J. (Ch.), 104; 24 W. R., 56; 1 Charley's Cases (Court), 124.

In a suit by the trustees of a will against their agent, for an account and the delivery up of securities belonging to the estate, commenced before the 1st of November, 1875, in which the defendant, by his answer, *admitted* the agency, and that the securities were in his possession, Bacon, V.C., made an order, under the present Rule, for an account, and for the delivery up of the securities.*

An order was made, on motion under this Rule, on admissions in the pleadings, for accounts to be taken and enquiries made in a District Registry, and for the appointment of a receiver. A similar order, made by the District Registrar, was, at the same time, pronounced to be *ultra vires* and irregular.†

In an action for the partition of real estate, in which the defendant, by his statement of defence, *admitted* the title of the plaintiffs as stated in the statement of claim, the Court of Appeal, reversing the decision of Malins, V.C., made an order, on motion by the plaintiffs under the present Rule, for the usual enquiry in a partition action as to the persons interested in the estate.‡

The present Rule must be read in connection with Order XXIX., Rule 11, *supra*. In *Bridson v. Smith*,§ in which, being an action for a declaration as to the construction of a will, it was essential to get all the defendants before the Court at the same time to discuss the questions involved, Hall, V.C., directed that the plaintiff might set the action down on motion for judgment, under Order XXIX., Rule 11, against three of the defendants who had made default in pleading, and give the remaining defendant, who had delivered a defence practically admitting the case made by the statement of claim, notice of motion for the same time under the present Rule.

Where, on the other hand, in an action against a husband and wife on a joint and several promissory note, a statement of defence was delivered, which, purporting to be the defence of both defendants, raised no defence as regarded the husband, Hall, V.C., made an order at once, under Order XXIX., Rule 11, and the present Rule, for final judgment against the husband upon his admissions on the pleadings.||

An order having been made in a suit, commenced before the 1st of November, 1875, under the present Rule, upon admissions of facts in the answer, equivalent to a decree for execution of the trusts of a settlement, with inquiries as to parties and accounts, and an order that a defaulting trustee should pay money into Court, and reserving further consideration, the registrar objected to draw up the order, on the ground that further consideration could not be reserved upon a motion, but only upon the trial of a cause. Hall, V.C., got over the difficulty by directing that the following words should be added to the ordinary form:—"And without requiring any further prior hearing, than this motion, of the cause, the

* *Rumsey v. Reade*, 1 Ch. D., 643; 45 L. J. (Ch.), 489; 33 L. T., 803; 24 W. R., 245.

† *Brassington v. Cussons*, 24 W. R., 881. See, also, *Irlam v. Irlam*, 2 Ch. D., 608; 24 W. R., 949.

‡ *Gilbert v. Smith*, 2 Ch. D., 686; 45 L. J. (Ch.), 514; 35 L. T., 43; 24 W. R., 568. *S. P., Parsons v. Harris*, 25 W. R., 410.

§ 24 W. R., 392; W. N., 1876, p. 103. *S. P., Parsons v. Harris*, 25 W. R., 410.

|| *Jenkins v. Davies*, 1 Ch. D., 696; 24 W. R., 690.

**Order XL,
Rule 11.**

further hearing of the said cause is adjourned.”* The Court of Appeal, in a subsequent case,† expressed its opinion that the course taken by Hall, V.C., in this case, was “consistent with the spirit of the Rules.”

In a suit against a trustee for breach of trust, in which the defendant did not specifically deny‡ that he owed a sum of money to the plaintiffs, his infant *cestuis que trustent*, he was taken to have admitted that he owed it to them, so as to satisfy the terms of the present Rule, and was ordered, by Malins, V.C., on motion by the plaintiffs under it, to bring the money into Court.§

Where, in an action for dissolution of partnership, the defendant's denial of the allegations contained in the statement of claim was evasive,|| Jessel, M.R., made a decree, on motion under the present Rule, for a dissolution of partnership, with an inquiry as to the terms of the partnership, and refused leave to the defendant to amend his defence.¶

In *Martin v. Gale*,** which was an action on a mortgage deed of his reversionary interest in stock executed by the defendant, when an infant, Jessel, M.R., made an order, on motion by the plaintiff under the present Rule, for an account of the moneys expended for necessaries, and for the repayment of the amount which might be found to be due, with interest at 4 per cent.

ORDER XLI.

ENTRY OF JUDGMENT.

Rule 1.

Every judgment shall be entered by the proper officer in the book to be kept for the purpose. The party entering the judgment shall deliver to the officer a copy of the whole of the pleadings in the action other than any petition or summons; such copy shall be in print, except such parts (if any) of the pleadings as are by these Rules permitted to be written: Provided that no copy need be delivered of any pleading a copy of which has been delivered on entering any previous judgment in such action. The forms in Appendix (D) hereto may be used, with such variations as circumstances may require.

* *Bennett v. Moore*, 1 Ch. D., 692; 45 L. J. (Ch.), 275; 24 W. R., 690.

† *Gilbert v. Smith*, 2 Ch. D., 686; 45 L. J. (Ch.), 514; 35 L. T., 43; 24 W. R., 568.

‡ See Order XIX., Rule 17, *supra*.

§ *Symonds v. Jenkins*, 34 L. T., 277; 24 W. R., 512.

|| See Order XIX., Rule 22.

¶ *Thorp v. Holdsworth*, 3 Ch. D., 637; 45 L. J. (Ch.), 406.

** 36 L. T., 357.

The forms in Appendix (D) are new.

The "proper officer" in actions at Common Law was, prior to the 1st of November, 1875, *the Master*, who entered the judgment in his book, at the time of signing it. The "proper officer" in the Court of Chancery was one of the entering clerks* of the Registrar's office; who entered the decree pronounced in the cause in the Registrar's book, within one day after it has been left for entry. The entry was examined by the entering clerk, and marked with his initials.† Indices of the entries of decrees were made by the entering clerks, and with the Registrar's books, were, when completed, transmitted to the Report Office in Chancery Lane, where both are preserved under the direction of the Clerks of Records and Writs. On payment of a small fee the public could inspect them during office hours, i.e., from 9 to 3 and from 4 to 6.‡

Order XLII,
Rule II

Reference is made in Order XXXVI., Rule 23, *supra*, to "the officer by whom judgments ought to be entered," and his absence from the trial at Nisi Prius is alluded to as a likely occurrence. The Masters or the entering clerks being still "the proper officers" for entering judgments (a word which, according to the interpretation clause, s. 100 of the Principal Act, includes "decrees") it is evident that their presence on Circuit, or even at the London and Middlesex sittings, is an unlikely incident. Hence the "book" required to be kept there by that Rule for the purpose of entering "findings" and "certificates" is to be in the custody of the Associate.

"In the book to be kept for the purpose." Different constructions have been put by the Masters of different Common Law Divisions of the High Court of Justice on these words. In the Common Pleas Division the "book" mentioned here has been assumed to be identical with the Cause Book mentioned in Order V., Rule 8, *supra*, and which "is to be kept in the manner in which Cause Books have heretofore been kept by the Clerks of Records and Writs in the Court of Chancery," which certainly seems to point to the Cause Book being not merely a Writ Book and Appearance Book, but a Judgment Book, also. A reference to the old form of Chancery Cause Books (which will be found transcribed in the note to Order V., Rule 8), will shew that it was a *continuous narrative of the whole cause* from beginning to end, in a concise form, the Registrar's book setting the particulars out in detail.

The Masters of the Common Pleas Division have very cleverly adapted the form of the Chancery Cause Book to the requirements of a Common Law action. The Common Pleas Cause Book contains a brief epitome of the whole history of every action.§

The Masters of the Queen's Bench and Exchequer Divisions point to the words "for the purpose," in the present Rule, as shewing that the Judgment Book is to be *wholly distinct* from the Cause Book. The book is intended, they say, to be kept exclusively for the entry of judgments.

Understanding the words, "shall be entered by the proper officer," literally, as meaning, that is, that the "proper officer" is to *copy* into the

* There were two, A to K, and K to Z.

† Order 1, Rule 18, of the Consolidated Orders of the Court of Chancery.

‡ In vacations from 11 to 1, except on Mondays and Saturdays, when the offices are closed.

§ See the form, which is transcribed in the note to Order V., Rule 8, *supra*.

**Order XII.,
Rule 1.**

"book" to be kept for the purpose *the entire judgment*, the Principal Clerk of the Queen's Bench Division actually underwent for a whole year the manual labour of copying into the book, in his own handwriting, the entire judgment, however lengthy it might be. This was found, however, so laborious a process, that a new system was substituted for it. The party signing judgment has to deliver to the officer a copy of the judgment, as well as of the rest of the pleadings. These copies, which are partly in print and partly written, arranged in chronological order, now, to all intents and purposes, constitute in the Queen's Bench Division the "book to be kept for the purpose," under the present Rule. This "book" is, however, supplemented by an Index, alphabetically arranged in the names of the persons *against* whom judgment has been signed, and containing simply a reference to the folio in which the cause is to be found. The Index is open to the public to search. In addition to the Index, the Masters of the Queen's Bench Division keep a Judgment Book for their own private information, which, with the addition of a column for reference to the "Index," is identical with the form of Judgment Book in use in the Exchequer Division.

The Masters of the Exchequer Division regard the copies of the judgments delivered by the parties entering the judgments, arranged in chronological order, as "the book to be kept for the purpose" under the present Rule. But they supplement this "book" by another kept in the following form, for facility of reference:—

| Date. | Letter and No. of Cause. | Defendant. | Plaintiff. | Nature of Judgment. | Debt. £. s. d. | Costs. £. s. d. | Solicitor. | No. of Judgment. |
|-------|--------------------------------|------------|------------|------------------------|-------------------|--------------------|------------|---------------------|
| 1877. | | | | | | | | |

"A copy of the whole of the pleadings." The object of requiring this copy is to supply the place of the ancient Judgment Roll, which constituted the "record" of the case, and which is now done away with under the Supreme Court of Judicature Acts.* See, as to this Roll, and as to entering judgment upon it, the Common Law Procedure Act, 1852, ss. 152, 153, and 206, and Archbold's Practice, pp. 527, 528.

Rule 2.

Where any judgment is pronounced by the Court or a Judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, and the judgment shall take effect from that date.

The Rule embodies the practice of the Court of Chancery.

Decrees in that Court were dated of the day on which judgment was actually pronounced,† and the recital of the day, month and year when it was pronounced preceded the other formal parts of the decree.‡

* See as to the use made of it in proving an indictment, *Regina v. Scott*, 2 Q. B. D., 415.

† See *Attorney-General v. Stamford*, 7 Jur., 359, L.C.

‡ Daniel's Chancery Practice, pp. 844, n., 862.

Rule 3.

Order XXI.,
Rule 3.

In all cases not within the last preceding Rule, the entry of judgment shall be dated as of the day on which the requisite documents are left with the proper officer for the purpose of such entry, and the judgment shall take effect from that date.

By Rule 56 of Hil. T., 1853, all judgments, whether interlocutory or final, shall be entered of record of the day of the month or the year, whether in term or vacation, when signed, and shall not have relation to any other day. "Signing" and "entering" judgment are used in the present Act indiscriminately (see, *e.g.*, Order XIII., Rules 3 and 4, *supra*). They are contemporaneous acts, but not the same act.

Upon every decree entered in the Registrar's book by one of the entering clerks he marked the day of the month and year when it was so left for entry.* This date had to be reproduced in every writ of execution.

Rule 4.

Where under the Act, or these Rules, or otherwise, it is provided that any judgment may be entered or signed upon the filing of any affidavit or production of any document, the officer shall examine the affidavit or document produced, and if the same be regular, and contain all that is by law required, he shall enter judgment accordingly.

This is in accordance with the practice of the Court of Chancery. At the time of "bespeaking" a decree, the party bespeaking it must have left with the Registrar, in case any party or person served did not appear at the hearing, an affidavit of service on such party or person.† If admissions were to be entered as read, the original paper of admissions, signed by the parties or their solicitors, must have been left for inspection.‡ If a traversing note had been filed, and the defendant did not appear at the hearing, the Record and Writ Clerk's certificate that the note had been filed, and an affidavit of service of a copy of the note, and of subpoena to hear judgment must have been left for inspection.§ If the Bill had been taken *pro confesso*, the order of the Record and Writ Clerk to attend at the hearing, with the record of the Bill, and any previous orders as to contempt, must have been left for inspection.||

Rule 5.

Where by the Act, or these Rules, or otherwise, any

* Order XXIX., Rule 7, of the Consolidated Orders of the Court of Chancery.

† Reg. Regul., 15th Mar., 1860, Rule 21.

§ Reg. Regul., 15 Mar., 1860, Rule 25.

‡ *Ibid.*, Rule 23.

|| *Ib.*, Rule 26.

**Order XLI,
Rule 5.**

judgment may be entered pursuant to any order or certificate, or return to any writ, the production of such order or certificate sealed with the seal of the Court, or of such return, shall be a sufficient authority to the officer to enter judgment accordingly.

See the note to the last Rule, and to Rule 1 of this Order, *supra*.

"Any certificate." The reference here is to the certificate of the finding of the Jury, required to be kept in a book by the Associate under Order XXXVI., Rule 23, *supra*.

The concluding portion of this Rule is a repetition of Order XXXVI., Rule 24, *supra*.

"Return to any writ." This refers, more particularly, to the return by the Sheriff of the inquisition as to the *quantum* of damages, under a writ of inquiry.

"Sealed with the seal of the Court." This is a practice, analogous to the former practice of stamping the *postea* or judgment paper with the seal of the Court.

Rule 6.

Any judgment of nonsuit, unless the Court or a Judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; but in any case of mistake, surprise, or accident, any judgment of nonsuit may be set aside on such terms, as to payment of costs and otherwise, as to the Court or a Judge shall seem just.

This Rule is a re-enactment of the last clause of the 46th Rule of the Principal Act.

As to "nonsuit," see Order XXXVI., Rule 19, *supra*. This Rule will afford a check, it may be assumed, upon plaintiffs electing to be nonsuited after they have put the defendant to the trouble of appearing at the trial.

"The reason," says Mr. Serjt. Stephen, "of this practice is that, after a nonsuit, which is only a default, the plaintiff has been allowed to commence the same suit again for the same cause of action, but after a verdict had for the defendant and judgment consequent thereupon, he is for ever barred, unless the judgment be afterwards reversed, from attacking the defendant upon the same ground of complaint."*

ORDER XLII.

EXECUTION.

Rule 1.

A judgment for the recovery by or payment to any

* 3 Steph. Comm., p. 551.

person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the said Act might have been enforced at the time of the passing thereof.

Order XLII.,
Rule 1.

The writs of execution for payment of money in use at Common Law were *fi. fa.*, *lev. fac.*, *ca. sa.*, *elegit*, *venditioni exponas*, *distringas nuper vicecomitem*, *feri facias de bonis ecclesiasticis*, and *sequestrari facias de bonis ecclesiasticis*. These were for the payment of money. There was also the writ of *hab. fac. pos.* for the recovery of land and the writ of delivery for the return of specific chattels detained. Forms of all these writs, except *lev. fac.* and *distringas nuper vicecomitem*, will be found in Appendix (F) to this Schedule, *infra*. The writs of execution in use in the Court of Chancery were *fi. fa.*, *elegit*, *venditioni exponas*, *feri facias de bonis ecclesiasticis*, *sequestrari facias de bonis ecclesiasticis*, attachment, and sequestration. The first five were borrowed from the Common Law, the last two* were peculiar to the Court of Chancery. Forms of writs of attachment and sequestration will be found in Appendix (F), *infra*.

As regards the Court of Probate, by the Probate Act, 1857, s. 25, it was enacted that "the Court of Probate shall have the like powers for enforcing decrees and judgments given by the Court under this Act, as are by law vested in the Court of Chancery."

Attachment for contempt was the only compulsory process (except warrants to arrest ships) ever resorted to in practice in the Admiralty Court to enforce compliance with its decrees.†

Rule 2.

A judgment for the payment of money into Court may be enforced by writ of sequestration, or, in cases in which attachment is authorised by law, by attachment.

See, as to this Rule, Orders XLIV. and XLVII., *infra*; and also Order XXIX., Rule 3, of the Consolidated Orders of the Court of Chancery.

See also the Debtors' Act, 1869, s. 8.

Rule 3.

A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession.

This writ was known as the Common Law writ of *hab. fac. pos.*, in ejectment. See, further, as to the writ, Order XLVIII., *infra*.

* There was a writ of attachment at Common Law, but it was not a writ of execution for money.

† Williams and Bruce's Admiralty Practice, p. 299.

Order XLII.,
Rule 4.

Rule 4.

A judgment for the recovery of any property than land or money may be enforced :

By writ for delivery of the property.

By writ of attachment.

By writ of sequestration.

As to the writ of delivery, see Order XLIX., *infra*.

As to the writ of attachment, see Order XLIV., *infra*, and Rule of this Order, *supra*.

As to the writ of sequestration, see Order XLVII., *infra*, and Rule of this Order, *supra*.

In an action for rent and for the return of specific goods, judgment has been signed for the amount of the rent in default of appearance of the plaintiff was directed by Quain, J., at chambers, to sign judgment for the return of the specific goods, with the option of enforcing writ of delivery, of attachment, or of sequestration.*

Rule 5.

A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment and committal.

"Attachment" and "committal" are, in one point of view, the same, but it is apprehended that "committal" here means the exercise of summary jurisdiction vested in every Judge of a Court of Record of coming without process or further proof the immediate apprehension and imprisonment of any party guilty of contempt of Court. See Order XLII., Rule 2, of the Consolidated Orders of the Court of Chancery.

In *Piper v. Piper*,† the plaintiff applied, under this Rule and Rule of this Order, *infra*, for a writ of attachment against a defendant in contempt, who did not appear, although the notice of motion was for an order of committal. Malins, V.C., ordered the writ of attachment to issue, as "the greater includes the less."

By the Statute 17 & 18 Vict. c. 34, s. 4, a reasonable sum of money to defray the expenses of coming and attending to give evidence, and returning from giving such evidence, must be tendered to a witness. Therefore, where an order has been made, under Order XLV., Rule 1, for the oral examination of a judgment-debtor "as to whether any and what debts are owing to him," the party applying for the attachment of the judgment-debtor for non-compliance with the Order, must shew, by affidavit, that "conduct-money" has been tendered to the judgment-debtor. The affidavit must also shew that there is some good reason for bringing the judgment-debtor up to London, and not examining him at his place of residence.‡

* *Ivory v. Cruickshank the Younger*, 1 Charley's Cases (Chambers),

† W. N., 1876, p. 202. See Rule 20 of this Order, *infra*.

‡ *The Protector Endowment Company v. Whitlaw*, 36 L. T., 467.

In *Battley v. Sears*,* a rule *nisi* for an attachment for disobedience to the order of the Court was issued against a defendant by Cockburn, C.J., for refusing to give up a diamond ring or pay for it, execution issued on a judgment to that effect against the defendant having proved futile, as she was a married woman.

Order XLII.,
Rule 5.

Rule 6.

In these Rules the term "writ of execution" shall include writs of *fi. fa.*, *capias*, *elegit*, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party" shall mean the issuing of any such process against his person or property as under the preceding Rules of this Order shall be applicable to the case.

As to writs of *fi. fa.* and *elegit*, see Order XLIII., *infra*.

As to writs of sequestration, see Order XLVII., *infra*.†

As to writs of attachment, see Order XLIV., *infra*.

The writ of "capias" (*ca. sa.*) is not mentioned as applicable to any "case" under any of "the preceding Rules;" and the only mention of it is in the *present* Rule. There seems to be a popular impression that the writ of *ca. sa.* has been entirely abolished.‡ There are, however, several cases to which it is still applicable.‡

"All subsequent writs," *e.g.*, "*venditioni exponas*;" see Order XLIII., Rule 2, *infra*.

Rule 7.

Where a judgment is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a Judge for leave to issue execution against such party. And the Court or Judge may, if satisfied that the right to relief has arisen according to the terms of the judgment, order that execution issue accordingly, or may direct that any issue or question

* *Times*, Tuesday, March 7th, 1876.

† By the Debtors' Act, 1869.

‡ See sections 4 and 5 of the Act just cited.

Order XLII., necessary for the determination of the rights of the parties
Rule 7. be tried in any of the ways in which questions arising in
 an action may be tried.

This Rule must be read with Rule 23 of this Order, *infra*.

At Common Law it is not usual to specify any conditions or contingencies in the judgment. The forms in the Schedule, Appendix (D), *infra*, agree with the former practice at Common Law. "It is adjudged that the plaintiff recover against the defendant £ , and £ for his costs of suit." "It is adjudged that the plaintiff recover possession of the land in the said writ mentioned." "It is adjudged that the plaintiff recover nothing against the defendant, and that the defendant recover against the plaintiff £ for his costs of defence." In the case of judgment entered up under a *cognovit*, or on a warrant of attorney, or on a consent order of a Judge, the judgment is equally simple, absolute, and unconditional in its terms; but, before signing it, the conditions precedent (if any) must be fulfilled. Also before issuing execution the conditions precedent (if any) must be performed. Thus, if *the defeazance* to a warrant of attorney to confess judgment lays it down as a condition precedent to the issuing of execution, that a demand must be made of the money, to which the judgment relates, such demand must be made accordingly,* before execution can issue. But *the judgment* would say nothing about the demand. It would be in the usual, simple, absolute and unconditional form.

The present Rule applies to cases of *decrees in Chancery*,† where by the terms of the decree *itself* some condition is specified or contingency pointed out, which must be fulfilled, or happen, before execution can issue upon the decree. In all such cases, under the present Rule, three things must have concurred before execution can issue. First, the condition must have been fulfilled, or the contingency have happened; secondly, a demand must have been made upon the party against whom the person is entitled to relief; and thirdly, an application must have been made to the Court, or a Judge, and they or he must have been "satisfied" that the right to relief has arisen according to the terms of the decree.

The Rule would seem to impose two new restrictions not imposed by the previously existing law,‡ were it not that the 23rd Rule says that the Rules of this Order shall *not curtail any right* heretofore existing to enforce any decree. See, however, Order XLIV., Rule 2, *infra*.

Rule 8.

Where a judgment is against partners in the name of the firm, execution may issue in manner following:—

* Archbold's Practice, p. 973.

† By the interpretation clause of the Principal Act (s. 100), "judgment" in these Acts includes "decree."

‡ By Order XXIX., Rule 1, of the Consolidated Orders of the Court of Chancery, *no demand* was necessary where any person was by any decree directed to pay any money, or deliver up and transfer any property, real or personal, to another. By the Order of the 7th of January, 1870, a Commission of sequestration was issued, *without any special order*, at the expiration of the time limited by any decree for the payment of money or costs.

- (a.) Against any property of the partners as such. Order XLII.,
Rule 8.
- (b.) Against any person who has admitted on the pleadings that he is, or has been adjudged to be, a partner.
- (c.) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave so to do; and the Court or Judge may give such leave if the liability be not disputed, or, if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

(a.) As to proceedings against parties in the name of the firm, see Order XII., Rules 12 and 12a, and Order XVI., Rules 10 and 10a, *supra*.

(b.) This Rule only applies to the case of parties sued in the name of the firm. If one of two partners is sued, the old difficulties may still arise from the circumstance that the seizure and disposal of the undivided share of one partner under a *fi. fa.* does not divest the other partner of his interest in the partnership property.*

(c.) As to service on one or more of the partners, see Order IX., Rule 6 and 6a, *supra*.

Rule 9.

No writ of execution shall be issued without the production to the officer by whom the same should be issued of the judgment upon which the writ of execution is to issue or an office copy thereof, showing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution.

“Production of the judgment.” This is in accordance with the former practice at Common Law, as prescribed by Reg. Gen. Hil. T., 1853, Rule 71. “No writ of execution shall be issued till the judgment paper, postea, or inquisition, as the case may be, has been seen by the proper

* See *Burton v. Green*, 3 Car. and P., 306; Archbold's Practice, pp. 659, 660.

**Order XLII.,
Rule 9.**

officer." It is also in accordance with the practice of the Court of Chancery, the decree, or order, or an office copy of it must have been produced to the Record and Writ Clerk, and before issuing the writ he must have been satisfied by affidavit of the due service of the decree, and that it had not been obeyed.*

In *Bolton v. Bolton*,† the Record and Writ Clerks having declined to issue a writ of *fi. fa.*, for the recovery of the costs of the defendant against the plaintiff, under Order XXIII., Rule 1, on the ground that, while the form in App. (F), No. 1, recited that the money was adjudged "to be paid by a judgment of the said Court," no judgment whatever had been signed, or pronounced, in the case, Hall, V.C., directed that the form No. 1 in App. (A.) should be varied under Rule 12 of this Order, *infra*, on the principle of treating the direction contained in Order XXIII., "the plaintiff shall pay the defendant's costs," as equivalent to a judgment of the Court.‡

Rule 10.

No writ of execution shall be issued without the party issuing it, or his solicitor, filing a *præcipe* for that purpose. The *præcipe* shall contain the title of the action, the reference to the record, the date of the judgment, and of the order, if any, directing the execution to be issued, the names of the parties against whom, or of the firms against whose goods, the execution is to be issued; and shall be signed by the solicitor of the party issuing it, or by the party issuing it, if he do so in person. The forms in Appendix (E) hereto may be used, with such variations as circumstances may require.

The forms in Appendix E., *infra*, are new.

"No writ of execution shall be issued without a *præcipe* being filed with the proper officer." Reg. Gen. Hil. T., 1853, Rule 71. The practice in the Court of Chancery is the same. Previously to the writ being issued, a copy of the *præcipe* must have been left with the entering clerk in the Registrar's Office, and another copy have been marked by him as entered; and the latter must also have been filed with the Record and Writ Clerk at the time the writ was sealed.§

The forms of the *præcipe* in Appendix (E) are taken from the Chancery practice, as will at once be seen in comparing them with the forms of *præcipe* given in the Form-book accompanying Daniel's Chancery Practice,|| and with the forms of *præcipe* contained in Chitty's Practice.¶

* Braithwaite's Pr., 167.

† 3 Ch. D., 276; 35 L. T., 358; 24 W. R., 663.

‡ The necessity for such a "variation" has been obviated as to the future, by the new Rule 2 of Order XXIII.

§ *Smith v. Thompson*, 4 Mad., 179, Ord. I, Rule 18, of the Consolidated Orders of the Court of Chancery; Braithwaite's Pr., 161.

|| Pp. 312, 695, 977, 983, 997.

¶ Pp. 303, 354.

This Rule, as amended by the insertion of the words "or on behalf of," after the words "signed by," enables the solicitor's clerk to sign. **Order XLII., Rule 10.**

Rule 10a.

Order XLII., Rule 10, of the Rules of the Supreme Court shall be read as if the words "or on behalf of" had been inserted after the words "signed by."

This new Rule was added by Rule 17 of the Rules of the Supreme Court, June, 1876. Its object is to enable the solicitor's clerk to sign the *præcipe*, under Rule 10.

Rule 11.

Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same, and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor shall also be indorsed upon the writ, and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be.

This Rule is copied *verbatim* from the Reg. Gen. Hil. T., 1853, Rule 73, with the omission of the words of that Rule, which suppose the case of an attorney suing out the writ who is not an attorney of the Court from which the writ is issued, these words being unnecessary, as under section 87 of the Principal Act, *supra*, all attorneys and solicitors of the Superior Courts are solicitors of the Supreme Court.

See the notes to Order IV., *supra*.

Rule 12.

Every writ of execution shall bear date of the day on which it is issued. The forms in Appendix (F) hereto may be used, with such variations as circumstances may require

The first clause of the Rule is copied from Reg. Gen. Hil. T., 1853, Rule 72. See a similar provision as to writs of summons, Order II., Rule 8, *supra*.

**Order XLII,
Rule 12.**

The forms in Appendix (F), *infra*, are new. See the notes to Orders XLIII-XLIX., *infra*.

These forms are "*prescribed*" (see Order II., Rule 2), and are thus practically incorporated into the present Act. A *footnote* to the form of writ of *fi. fa.*, given in Appendix (F), No. 1, directs that the interest upon costs to be inserted in the form is to run from "the date of the certificate of taxation." Held, therefore, by the Common Pleas Division, that the interest upon costs now runs from the date of the Master's *allocatur*, and not, as formerly in the Common Law Courts, from the date of the *incipitur* or entry of judgment.*

"With such variations as circumstances may require." This proviso was acted upon in the case of *Bolton v. Bolton*,† in which Hall, V. C., gave leave to amend the writ of *fi. fa.*, so as to enable a defendant to recover his costs, under Order XXIII., though no judgment had been pronounced for them, against a plaintiff who had discontinued his action and made default in paying them.

Rule 13.

In every case of execution the party entitled to execution may levy the poundage,‡ fees, and expenses of execution over and above the sum recovered.

This Rule is copied *verbatim* from the 123rd section of the Common Law Procedure Act, 1852. See *Roe v. Hammond*.§ See also 29 Eliz. c. 4.

Rule 14.

Every writ of execution for the recovery of money shall be indorsed with a direction to the Sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable, and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon if sought to be recovered, at the rate of £4 per cent. per annum from the time when the judgment was entered up, provided that in cases where there is an agreement between the parties that more than £4 per cent. interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed.

This Rule is copied *verbatim* from Reg. Gen., Hil. T., 1853, Rule 76, with the addition of the words "for the recovery of money," after "every writ of execution." See 1 & 2 Vict. c. 110, s. 17.

* *Schröder v. Clough*, 46 L. J. (C. P.), 365; 35 L. T., 850.

† 3 Ch. D., 276; 24 W. R., 663; 35 L. T., 358.

‡ 12d. in every £1; if over £100, 6d. for every £1 above £100.

§ 2 C. P. D., 300.

Rule 15.

Order XLII.,
Rule 15.

Every person to whom any sum of money or any costs shall be payable under a judgment shall, immediately after the time when the judgment was duly entered, be entitled to sue out one or more writ or writs of *fi. facias* or one or more writ or writs of *elegit* to enforce payment thereof, subject, nevertheless, as follows :—

- (a.) If the judgment is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period.
- (b.) The Court or Judge at the time of giving judgment, or the Court or a Judge afterwards, may give leave to issue execution before, or may stay execution until, any time after the expiration of the periods hereinbefore prescribed.

The previous practice at Common Law was prescribed by s. 120 of the Common Law Procedure Act, 1852, and Rule 57 of the Reg. Gen. Hil. T., 1853, under which execution issued in *fourteen days* after verdict, unless the Court or Judge ordered execution to issue at an earlier or later period. It was usual for the Judge at the trial to grant execution within 4 days, called “speedy execution” under 1 Wm. IV. c. 7, s. 2, in all *substantially* undefended actions for liquidated claims, and in ejectment to recover vacant possession.* Against acceptors of bills of exchange and makers of promissory notes speedy execution was granted, almost as a matter of course.

The practice in Equity as to issuing a *fi. fa.* or *elegit* for payment of a sum of money, was regulated by Order XXIX., Rule 6, of the Consolidated Orders of the Court of Chancery, which required that a lunar month (*twenty-eight days*)† should elapse from the entry of the decree before suing out the writ. A writ of attachment, on the other hand, for the non-performance of a decree, issued as soon as the Record and Writ Clerk was satisfied by affidavit that the decree had been duly served, and had not been obeyed.‡

A writ of sequestration issued on the return of the writ of attachment. If, however, a time was limited by the decree for payment of any money, or for the performance of any other act, a writ of sequestration in the former case, and a writ of attachment in the latter, issued *at the expiration of the time so limited*.§

* Day's Common Law Procedure Acts, p. 143. Archbold's Practice, p. 413.

† Order XXXVII., Rule 10 of the Consolidated Orders.

‡ Daniel's Chancery Practice, p. 908 ; Braithwaite's Pr., 167.

§ Order of the 7th January, 1870.

Order XLII.,
Rule 15.

The present Rule, it will be seen, effects a very important alteration in the law of execution in favour of the party who has entered judgment for a sum of money or costs. He will in all cases, on the entry of the judgment, be entitled to IMMEDIATE EXECUTION by *fi. fa.* or *elegit* as soon as the judgment (or decree) is entered, unless there be a time limited by the judgment (or decree). The exception established by subsection (a) follows the 7th Rule of this Order, and the previous practice of the Court of Chancery. (See the note to that Rule, *supra*.) A writ of *sequestration* may issue, in the Chancery Division, as under the former practice, at the expiration of the time limited, and this practice is extended by Order XLVII., *infra*, to the Common Law Divisions of the High Court.

Subsection (b) saves the power of the Court or Judge to modify the practice by accelerating or retarding execution. This subsection, by the word "hereinbefore," gives the Court or Judge power to order the issue of execution *before* the time limited by a judgment (or decree) has expired. It will also afford a valuable protection to defendants, by enabling them to apply for a stay of execution.

Execution in fourteen days under the old practice was directed instead of immediate execution under the new, in several cases which occurred at Nisi Prius shortly after the commencement of the Supreme Court of Judicature Acts. "Although I am now able," said Huddleston, B., in one of these cases,* "to order immediate execution, I shall adopt the old practice, and give execution in fourteen days."†

Rule 16.

A writ of execution, if unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, by leave of the Court or a Judge, be renewed, by the party issuing it, for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the Court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the Sheriff, signed by the party or his attorney, and bearing the like seal of the Court; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof.

* See *Murray v. Infield*, *Times*, November 6th, 1875; 1 Charley's Cases (Court), 142.

† See also per Pollock, B., in *Taylor v. Sherley*, *Times*, November 26th, 1875; 1 Charley's Cases (Court), 143.

This Rule is copied almost *verbatim* from section 124 of the Common Law Procedure Act, 1852. It omits, however, the direction that the seal shall be "kept at the office of the Masters of the Court," and the word "issue" has been substituted for "*teste*." Order XLII.,
Rule 16.

The notice to the sheriff is necessary where the writ is in the possession of that functionary. If the party does not wish the writ to be executed, however, he will retain it in his own possession after renewal as well as before it.

There is a curious slip in this Rule, the word "attorney" having been left in; it should have been "solicitor" (see s. 87 of the Principal Act, *supra*).

Rule 17.

The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal as in the last preceding Rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed.

The Rule is copied from section 125 of the Common Law Procedure Act, 1852.

"Sufficient evidence" means *prima facie* evidence (see note to Order VIII, Rule 2, *supra*).

Rule 18.

As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment.

Section 128 of the Common Law Procedure Act, 1852, provided, that "during the lives of the parties to a judgment or those of them during whose lives execution may at present issue within a year and a day without a *scire facias*, and within six years after the recovery of the judgment, execution may issue without a revival of the judgment."

Rule 19.

Where six years have elapsed since the judgment, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly. And such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make

Order XLII.,
Rule 19.

an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or Judge may impose such terms, as to costs or otherwise, as shall seem just.

This Rule is taken from sections 129 and 130 of the Common Law Procedure Act, 1852, with, however, some important changes. S. 129 of the Common Law Procedure Act, 1852, is classed in most of the text books not under the head of "renewal of writs of execution," but of "revival of judgments."* Revival of judgments is entirely ignored in the present enactment, and the process applicable to it is appropriated, to some extent, to the renewal of writs. The 129th section gave the party desirous of renewing his judgment the alternative of suing out a writ of revivor of the judgment, or of applying to the Court or a Judge for leave to enter a "suggestion" that it manifestly appeared that the party was entitled to issue execution upon the judgment, and upon such application the Court or Judge might (by s. 130) allow such suggestion to be entered accordingly. The framers of the present Rule have adapted the alternative modes of procedure, discarding the "suggestion," and substituting for it a simple "order that the party is entitled to issue execution," and discarding the title "writ of revivor," and substituting for it an "order" that an "issue" be "tried" "in any of the ways in which any question in an action may be tried." S. 131 of the Common Law Procedure Act, 1852, provided that "the pleadings and proceedings upon a writ of revivor should be the same as in an ordinary action." The "ways" in which an action under this Act may be "tried" are specified in Order XXXVI., Rule 2. *supra*. The costs are to be in the discretion of the Court or Judge. The old practice as to costs is contained in ss. 130 and 131 of the Common Law Procedure Act, 1852.

In the case of a writ of revivor the writ of execution must have been founded on the judgment on the writ of revivor.† It is apprehended that the practice will be similar where an issue is under this Rule directed to be tried.

It will be perceived that there is no limit of time fixed in this Rule within which the application must be made. A writ of revivor might have issued at any time within twenty years.‡

Rule 20.

Every order of the Court or a Judge, whether in an action, cause or matter, may be enforced in the same manner as a judgment to the same effect.

* See Chitty's "Forms," book 8, chapter 8; Archbold's Practice, vol. 2, part 3, chapter 6. In Lush's Practice judgment and execution are treated of together in book 1, chapter 9 (see p. 577).

† *Davis v. Norton*, 1 Bing., 133.

‡ And after twenty years, if there was an acknowledgment within the twenty years, 3 & 4 Wm. IV. c. 29, s. 40.

This is in accordance with the practice of the Court of Chancery. The process to enforce decrees and the process to enforce orders were in that Court absolutely identical. The XXIXth of the Consolidated Orders treats of them both together, without any distinction. Order XXII.,
Rule 20.

In *Piper v. Piper*,* a writ of attachment issued against a defendant who was merely in contempt for non-appearance. See also *The Protector Endowment Company v. Whitlaw*,† epitomized under Rule 5 of this Order, *supra*.

Rule 21.

In cases other than those mentioned in Rule 18, any person, not being a party in an action, who obtains any order or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the action; and any person not being a party in an action, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to the action.

This Rule is copied *verbatim* from Order XXIX., Rule 2, of the Consolidated Orders of the Court of Chancery. It works a great and salutary change in Common Law Procedure. As a general rule, where a person who was not a party to a judgment derived a benefit by, or became chargeable to the execution, proceedings had to be taken by writ of revivor, *scire facias*, or "suggestion," to make him a party to the judgment‡ before issuing execution—a cumbrous procedure.

Rule 22.

No proceeding by *auditâ querelâ* shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a Judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court or Judge may give such relief and upon such terms as may be just.

The *auditâ querelâ* was a writ that lay for the defendant against whom judgment was given, and who was therefore in danger of execution, or perhaps actually in execution, but who was entitled to be relieved upon some matter of discharge which had happened since the judgment, as if

* W. N., 1876, p. 202. See, also, Rule 5 of this Order, *supra*.

† 36 L. T., 467.

‡ 2 Saund., 6, n. 1; *Penoyer v. Brace*, 1 Lord Raym., 244; *Ransford v. Bosanquet*, 12 A. and E., 813; 2 Archbold's Practice, p. 1122.

**Order XLII,
Rule 22.**

the plaintiff had given him a general release, or if he had paid the debt to the plaintiff. It was a writ directed to the Court in which the judgment was recovered, stating that the complaint of the defendant had been heard, *audita querela defendantis*, and then setting forth the matter of complaint, and enjoining the Court to call the parties before them, and cause justice to be done. But the indulgence shown by the Courts in granting relief upon motion almost superseded the remedy by *audita querela*, and it might be said to have been nearly obsolete.*

A simple application by motion to a Court or by summons to a Judge is substituted by the present Rule for the abolished writ of *audita querela*. An affidavit of the facts will probably be necessary, as it was under the Reg. Gen. Hil. T., 1853, Rule 79.†

This Rule does not enable a Judge at chambers, even although he is the same Judge who tried the action, to order that the successful party at the trial shall pay his own costs, Order LV. directing that the costs shall follow the event in the Common Law Divisions, unless the Judge, on application, at the trial in the Divisional Court, shall otherwise order.‡
“No new fact” had “arisen” in this case.§

Rule 23.

Nothing in any of the Rules of this Order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever.

See, however, the note to Rule 7 of this Order, *supra*, and Order XLIV., Rule 2, *infra*.

Rule 24.

Nothing in this Order shall affect the order in which writs of execution may be issued.

Writs of *fi. fa.*, *lev. fac.*, *ca. sa.*|| and *elegit* may all be sued out at the same time; but when any one has been effectually executed, nothing can be done on another till the first has been returned. When returned, if it is a *fi. fa.*, and it appears by the return that part only has been executed, or if it is an *elegit* and part only has been levied on the goods, the party entitled to execution may issue a new writ of *fi. fa.*, *lev. fac.*, *ca. sa.*, or *elegit* for the remainder. No writ can be sued out for the remainder, however trifling the part may be which has been levied, until after the previous writ has been returned. If, on the other hand, the body be taken under a *ca. sa.*, no other writ can be executed in respect of the same judgment, unless the party whose body is taken escape, or be rescued, or die in execution. So, if lands be extended on an *elegit* and delivered to the judgment creditor, a *fi. fa.*, or *ca. sa.*, or

* See Steph. Comm., vol. 3, p. 577 n. (n), 7th edn.; 2 Saund., 137e.

† *Dearie v. Ker*, 4 Ex., 82.

‡ *Baker v. Oakes*, Q. B. D., 171; 46 L. J. (Q. B.), 246; 25 W. R., 220; 35 L. T., 671, 832.

§ Per Brett, L. J., in *Baker v. Oakes*, *ubi supra*.

|| Subject as to *ca. sa.*, of course, to the Debtors' Act, 1869, s. 4.

lev. fac. or fresh *elegit* cannot be executed against the judgment debtor in respect of the judgment upon which the *elegit* issued. **Order XLII., Rule 24.**

The learning on the "succession of writs" is preserved by the present Rule.*

ORDER XLIII.

WRITS OF FIERI FACIAS AND ELEGIT.

Rule 1.

Writs of *fieri facias* and of *elegit* shall have the same force and effect as the like writs have heretofore had, and shall be executed in the same manner in which the like writs have heretofore been executed.

See the note to Order XLII., Rule 24, *supra*, as to the succession in which writs of *fi. fa.* and *elegit* may be issued.

A form of the writ of *fi. fa.* will be found in the Appendix (F), No. 1, and of the writ of *elegit* in Appendix (F), No. 2. The form of the writ of *fi. fa.* is modelled upon the form of the writ contained in the Schedule (F), No. 1, to the Consolidated Orders of the Court of Chancery, not upon the Common Law form contained in the Schedule to the Reg. Gen. Hil. T., 1853. This will be seen to be the case on comparing the forms. The mention of costs, however, *eo nomine*, in the form contained in Appendix (F) to this Act is *new*, and it is important for the legal practitioner to note that it is necessary to specify their amount and also the date of the taxing-master's certificate, and that there is a separate direction to the sheriff to levy the amount of *the costs* plus £4 per cent. interest upon them from the date of the certificate of taxation. The rate of interest on the sum recovered is left open, instead of being fixed at £4 per cent. as heretofore in both Common Law and Chancery forms. (See Order XLII., Rule 14, *supra*.) The Common Law form directs the sheriff to levy the sum recovered plus interest at £4 per cent. The Chancery form first directs the sheriff to levy the sum recovered, and then separately directs him to levy interest on that sum at £4 per cent. The new form first directs the sheriff to levy the sum recovered plus interest on that sum at £ per cent., and then separately directs him to levy the costs plus interest on them at £4 per cent.

The same particulars as to costs must be entered in the writ of *elegit* as in the writ of *fi. fa.*

It will be seen that the writ of *elegit* is tested, "Witness OURSELVES at Westminster," &c. The form of *teste* to several of the other writs is "Witness *Ourselves* at Westminster, the day of 1875, in the year of *our* reign." This is much more in keeping with the regal style than the Common Law form of *teste*, "Witness *Sir Alexander Cockburn*, Knight, at Westminster, the day of in the year of our Lord."

The first hitch between Common Law and Chancery under the Supreme Court of Judicature Acts occurred in reference to the form of *teste* of writs, the Clerks of Records and Writs preferring the forms in the Appendix, the Masters of the Queen's Bench following the Common Law

* The reader who desires further information is referred to Archbold's Practice, part 1, chap. XXVII.

Order XLIII., Rule 1. form thus—"Witness, the Right Hon. Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain," on the strength of Order II., Rule 8, *supra*, which says, that the writ "shall be tested in the name of the Lord Chancellor." The contention of the Masters prevailed; and, as finally settled, the *teste* now runs thus:—"Witness, Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain."

In *Bolton v. Bolton*,* the writ of *fi. fa.* was "*varied*," under Rule 12 of Order XLII., in order to remove the objection raised by the Record and Writ Clerks, that no judgment of the Court had been signed, or pronounced and produced to them in that case, pursuant to Rule 9 of Order XLII. (The necessity for this "variation" of the writ has been obviated, as regards the future, by the new Rule 2 of Order XXIII.)

Rule 2.

Writs of *renditioni exponas*, *distringas nuper vicecomitem*, *fieri facias de bonis ecclesiasticis*, *sequestrari facias de bonis ecclesiasticis*, and all other writs in aid of a writ of *fieri facias* or of *elegit*, may be issued and executed in the same cases and in the same manner as heretofore.

A form of the writ *renditioni exponas* will be found in Appendix (F), No. 3; of the writ *fieri facias de bonis ecclesiasticis* in Appendix (F), Nos. 4 and 5; and of the writ *sequestrari facias de bonis ecclesiasticis* in Appendix (F), No 6, *infra*.

Upon the return of the sheriff that the goods remain on his hands under the writ of *fi. fa. for want of buyers*, the party entitled to execution may sue out a writ of *renditioni exponas*, which is a kind of supplemental writ of *fi. fa.*, commanding the sheriff to sell the goods forthwith. Under this writ the sheriff must sell, and is therefore justified in doing so at the best price he can get, however inadequate it may be. This writ the sheriff may be called on by a side bar rule to return.

Where a sheriff goes out of office after returning that he has levied, but that the goods remain in his hands for want of buyers, instead of suing out a writ of *renditioni exponas*, the party entitled to execution may sue out a writ of *distringas nuper vicecomitem*, directed to the then present sheriff, commanding him to *distrain the late sheriff* to sell the goods. The former sheriff must thereupon sell the goods and pay over the money, otherwise he will forfeit issues to the amount of the debt.

When the sheriff to a writ of *fi. fa.* returns "*nulla bona*," and that the party against whom it was issued is a beneficed clerk, not having any lay fee, the party entitled to execution may sue out a *fi. fa. de bonis ecclesiasticis*, directed to the bishop of the diocese (or to the archbishop, during the vacancy of the bishop's see), commanding him to cause to be made of the ecclesiastical goods belonging to the judgment debtor within his diocese, the amount of the judgment debt. The writ must be delivered to the registrar of the diocese, who will thereupon issue a sequestration, directed to the churchwardens, requiring them to levy the debt of the tithes and other profits of the clerk's benefice. The writ has priority only from the date of its publication, which is effected by affixing a copy of the writ on

* 3 Ch. D., 276; 24 W. R., 663.

the doors of the churches and chapels within the parish in which the benefice is situated. Order XLIII.,
Rule 2.

Instead of a *fi. fa. de bonis ecclesiasticis*, the party entitled to execution may sue out against a judgment debtor who is a beneficed clerk a writ of *sequestrari facias*, also directed to the bishop of the diocese, commanding him to enter into the rectory and parish church and take and sequester the same into his possession, and hold them until all the rents, tithes, rent-charges, oblations, obventions, fruits, issues, and profits, and of the other ecclesiastical goods in the diocese belonging to the debtor as rector, he shall have levied the judgment debt. This writ is in the nature of a *levari facias*. The rector cannot, however, be turned out of the parsonage house, as he is bound to reside notwithstanding the sequestration. The sequestrator is empowered, by 12 & 13 Vict. c. 67, to bring actions and levy distresses in his own name.

ORDER XLIV.

ATTACHMENT.

Rule 1.

A writ of attachment shall have the same effect as a writ of attachment issued out of the Court of Chancery has heretofore had.*

See a form of the writ of attachment in Appendix (F), No. 9, *infra*. There are different kinds of writs of attachment, *e.g.*, attachment on mesne process to enforce appearance. &c., and attachment on final process, to enforce the execution of decrees and orders. It is to the latter that allusion is here made. The form of the writ in all cases is the same, the indorsement only is different in different cases. The form in the Appendix (F), No. 9, is the stereotyped one.† The instrument (which should strictly follow the language of the decree) recites so much of the mandatory part of the decree as directs payment of the money or performance of the act.

The following form of indorsement may be useful:—

“By the Court.

“For breach of a decree [or an order] dated the day of 1875, made in a cause wherein *C.D.* is plaintiff, and *A.B.* is defendant, in not [*here recite so much of the mandatory part of the decree [or order] as directs payment of the money or performance of the act, and explains the purpose for which the attachment is issued*], as by the said decree the within-named *A.B.* was commanded.”‡

On a notice of motion for an order of “committal,” a writ of “attachment” may be ordered to issue, under Order XLII., Rule 5, on the principle that “the greater includes the less.”§

* See Chancery Order of 7th January, 1870.

† It will be found, *todidem verbis*, in Daniel's Form-book, 313.

‡ Adapted from Daniel's Form-book, 934.

§ *Piper v. Piper*, W. N., 1876, p. 202.

Order XLIV., Rule 1. As to what is a "contempt of Court," justifying a committal, see *The Republic of Costa Rica v. Erlanger*,* in which Malins, V.C., decided that a solicitor was guilty of contempt of Court, and the Court of Appeal reversed his decision.

If, after a reasonable interval, no return to the writ is made, an order may be obtained requiring the sheriff forthwith to make his return.†

Rule 2.

No writ of attachment shall be issued without the leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued.

This Rule throws considerable light upon Order XLII., Rule 7 (see the note to that Rule, *supra*). It alters completely the former practice in the Court of Chancery. The writ issued there without any leave of Court or Judge, all that was necessary being to satisfy (by affidavit) the Record and Writ Clerk who sealed it that the decree or order had been duly served, and had not been obeyed.

"The intention of the present Rule, following the analogy of the Act for the Abolition of Imprisonment for Debt,‡ was, that *the suitor* shall not have the power of imprisoning anybody, but *the Court* only. This Rule, once for all, deprives the suitor of the right he formerly had of imprisoning his opponent, if he chose to do it, at his own risk. The suitor acting thus might be a pauper, and unable to pay the costs, or might do it maliciously. It is now an order of Court, made upon motion, and, therefore, in many instances, after discussion. That is the new position of matters." Per Jessel, M.R., in *Abud v. Riches*.§

In a suit pending on the 1st of November, 1875, Hall, V.C., directed a writ of attachment to issue under the old practice, without notice, before the filing of the replication, for default in putting in an answer.||

In *Baigent v. Baigent*, in the Probate Division, Hannen, J., held that before making an application for an attachment for disobedience to a subpoena to bring in a will, notice of the application must be given to the party to be affected by the attachment, although the proceedings may have been commenced before the Supreme Court of Judicature Acts came into operation.¶ In a subsequent case,** however, his lordship said that he was "probably mistaken" in this decision, and that the proper course would have been to move for a rule *nisi* for an attachment under such circumstances.

* 46 L. J. (Ch.), 375.

† *Owen v. Pritchard*, W. N., 1876, p. 147. If the sheriff does not obey, an order *nisi* for his committal will be made. Pemberton on Judgments, 108.

‡ 32 & 33 Vict. c. 62.

§ 2 Ch. D., 528; 45 L. J. (Ch.), 649; 24 L. T., 713; 24 W. R., 637.

|| *Garling v. Royds*, 1 Ch. D., 81; 45 L. J. (Ch.), 56; 24 W. R., 23; 1 Charley's Cases (Court), 145.

¶ *Baigent v. Baigent*, *In the Goods of Thomas Baigent*, 1 P. D., 421; 33 L. T., 462; 24 W. R., 43; W. N., 1875, p. 218.

** *In the Goods of Cartwright*, 34 L. T., 72; 24 W. R., 214; W. N., 1876, p. 21. See *Battley v. Sears*, *Times*, Tuesday, March 7th, 1876, cited under Order XLII., Rule 4, *supra*.

In the case of *In Re a Solicitor*,* Jessel, M.R., held that an order for an attachment under Rule 9 of the Chancery Rules under the Debtors' Act, 1869, for non-payment by a solicitor of the balance found by the taxing-master's certificate to be due by him to his client, in respect of moneys received by him, could only issue upon notice to the solicitor under the present Rule. His lordship distinguished *Garling v. Royds*,† on the ground that the object there was "merely to compel the defendant to put in an answer, that is, to take a particular step in a pending cause on which no decree had been made," and the old practice was, therefore, applicable under the concluding words of s. 22 of the Principal Act.

Order XLIV.,
Rule 2.

In *Dallas v. Glyn*,‡ Malins, V.C., ordered an attachment to issue without notice against a defendant for not delivering up documents on oath pursuant to an order, the action being one in which notice of motion for a decree might have been made before the 1st of November, 1875. This decision his lordship gave, *teste seipso*, on the faith of *Garling v. Royds*. On an application being subsequently made to his lordship to discharge the order for an attachment, he assented to the motion, and, in doing so stated that, on further consideration, he did not concur in the decision in *Garling v. Royds*, and would, in future, treat the present Rule as applying to all actions, whether under the old practice or the new. His lordship, nevertheless, proceeded to distinguish the case before him from *Garling v. Royds*, as the former was one to which the new practice was plainly applicable.

It is sufficient to serve the notice of motion to commit § or of an application for a writ of attachment on the solicitor of the party sought to be committed || or attached.¶

There are no longer any fixed costs of an attachment which cannot be altered by the discretion of the Court. It should be understood in future that parties who move for a writ of attachment should ask for the costs at the same time. These costs are now, under Order LV., in the discretion of the Court. Per Jessel, M.R., in *Abud v. Riches*.**

ORDER XLV.

ATTACHMENT OF DEBTS.

Rule 1.

Where a judgment is for the recovery by or payment to any person of money, the party entitled to enforce it may apply to the Court or a Judge for an order that the judgment debtor be orally examined as to whether any and what debts are owing to him, before an officer of the Court, or such other person as the Court or Judge shall

* 1 Ch. D., 445; 45 L. J. (Ch.), 86; 24 W. R., 103.

† *Ubi supra*. ‡ 3 Ch. D., 190; 34 L. T., 897; 24 W. R., 881.

§ See Order XLII., Rule 5, *supra*.

|| *Richards v. Kitchen*, 36 L. T., 729; 25 W. R., 602.

¶ *Browning v. Sabin*, 5 Ch. D., 511; 12 N. C., 114.

** 2 Ch. D., 528; 45 L. J. (Ch.), 649; 24 L. T., 713; 24 W. R., 637.

Order XLV., appoint ; and the Court or Judge may make an order for
Rule 1. — the examination of such judgment debtor, and for the
 production of any books or documents.

The Rule is copied from section 60 of the Common Law Procedure Act, 1854.

The Court of Chancery had no proceeding analogous to that of attachment of debts at Common Law,* and a person to whom money was ordered to be paid by a Court of Equity, has been held not to be a judgment creditor within the meaning of the sections of the Common Law Procedure Act, 1854, relating to attachment of debts.† Under the present Order the practice is the same in Chancery as at Common Law.

It has been held that a debt of unascertained amount,‡ a debt due to one or more of several joint judgment debtors,§ a debt due, but not payable till some future time,|| rent due in the hands of a tenant,¶ and the proceeds of an execution in the hands of the sheriff,** are all attachable.

See, as to this Rule, under Order XLII., Rule 5.

Rule 2.

The Court or a Judge may, upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his solicitor stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called “the garnishee”) to the judgment debtor shall be attached to answer the judgment debt ; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a Judge, or an officer of the Court, as such Court or Judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

* See *Horsley v. Cox*, L. R., 4 Ch., 92.

† *Ex parte The Financial Corporation*, L. R., 4 C. P., 155.

‡ *Daniel v. McCarthy*, 7 Ir. Com. Law Rep., 261, Q. B.

§ *Miller v. Mynn*, 1 E. & F., 1075.

|| *Sparks v. Younge*, 8 Ir. Com. Law Rep., 251, Ex.

¶ *Mitchell v. Lee*, L. R., 2 Q. B., 259.

** *Murray v. Simpson*, 8 Com. Law Rep., Appendix xlv., Ex.

The Rule is copied almost *verbatim* from the 61st section of the Common Law Procedure Act, 1854.* Order XLV.,
Rule 2.

As a general rule, where a judgment debt remains unsatisfied, if the execution debtor could maintain against the intended garnishee an action to recover the debt, which the execution creditor seeks to attach, an attachment order may be obtained under this Rule, provided the execution creditor could sue out a writ of *fi. fa.* against the execution debtor.†

It seems doubtful whether notice of a prior attachment out of the Lord Mayor's Court interferes with the operation of an order under this Rule ; it certainly would not, when such notice is served out of the limits of the City.‡

"Debts owing." Debts due to a *cestui que trust* by his trustees can now be attached under the present Rule, taken in connection with Order III., Rule 6, subject, if the garnishee disputes his liability, to the statement of a special case under Rule 5 of this Order, *infra*.§

"Debts accruing." The debt must be an existing one at the time of the attachment.|| The mere probability of money becoming due is not a "debt accruing."¶ Therefore, in *Richardson v. Elmit*,** the Divisional Court of the Common Pleas Division held that a mere notice (on which nothing had been done), to treat for compensation, in respect of premises required by the Metropolitan Board of Works, was not a "debt accruing" which could be attached.

But a "*debitum in presenti, solvendum in futuro*," is attachable. Thus, where the garnishee is bound by an agreement to pay a sum of money to the defendant by monthly instalments, the instalments are attachable, as they fall due.††

Rule 3.

Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the Court or Judge shall direct, shall bind such debts in his hands.

The Rule is copied *verbatim* from section 62 of the Common Law Procedure Act, 1854,‡‡ with the addition of the words "Court or" before "Judge."

"Shall bind such debts in his hands." The debt is bound, *e. g.*, in the hands of the judgment debtor as against his trustee in bankruptcy.§§

* See Day's Common Law Procedure Acts, 4th edn., pp. 314, 315, 316.

† See *Jones v. Jenner*, L. J., 25 Ex., 319, per Bramwell B. ; and *Miller v. Mynn*, 1 E. and E., 1875.

‡ See *Newman v. Rook*, 4 C. B., N.S., 434.

§ *Wilson v. Dundas*, 1 Charley's Cases (Chambers), 124. Per Quain, J. || *Jones v. Thompson*, E. B. & E., 63.

¶ Day's Common Law Procedure Acts, 316.

** 2 C. P. D., 9 ; 36 L. T., 58.

†† *Tapp v. Jones*, L. R., 10 Q. B., 591, in which two instalments of £10 each were attached.

‡‡ See Day's Common Law Procedure Acts, 4th edn., pp. 316, 317.

§§ *Emmanuel v. Bridger*, L. R., 9 ; Q. B., 286.

Order XLV.,
Rule 4.

Rule 4.

If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due, or claimed to be due, from him to the judgment debtor, or if he does not appear upon summons, then the Court or Judge may order execution to issue, and it may issue accordingly, without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment debt.

The Rule is copied almost *verbatim* from section 63 of the Common Law Procedure Act, 1854.*

Rule 5.

If the garnishee disputes his liability, the Court or Judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined.

This Rule is founded, to some extent, on s. 64 of the Common Law Procedure Act, 1854.

That enactment, however, provided that the judgment creditor might, in the event of a dispute, proceed by a writ calling upon the garnishee to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor, if less than the judgment debt, and for costs of suit. The proceedings upon this writ were the same, *mutatis mutandis*, as upon a writ of revivor.

The present Rule provides† a substitute for this *quasi* writ of revivor, in the shape of an order that an issue be tried in any manner in which an issue in an action may be tried. As to these "manners" see Order XXXVI., Rule 2, *supra*.

In *Wilson v. Dundas*,‡ at chambers, in which the garnishee disputed his liability, Quain, J., ordered a *special case* to be stated under the present Rule for determining the question.

"Disputes his liability." The dispute must be a substantial one (*Newman v. Rook*),§ and *bonâ fide* (*Wise v. Brokenshaw*).||

* See *Kent v. Tomkinson*, L. R., 2 C. P., 502.

+ Like Order XLII., Rule 19, *supra*.

‡ 1 Charley's Cases (Chambers), 124. See Rule 2 of this Order, *supra*.

§ 4 C. B. (N. S.), 434.

|| 29 L. J. (Ex.), 240.

Rule 6.

Order XLV.,
Rule 6.

Whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or Judge may order such third person to appear, and state the nature and particulars of his claim upon such debt.

This Rule is copied from section 29 of the Common Law Procedure Act, 1860.

The garnishee may have a *bonâ fide* doubt as to whether some third party, and not the judgment debtor, is really entitled to the debt. The present Rule enables the garnishee to resolve this doubt by a judicial decision, obtained by taking out a summons, in the nature of an interpleader summons, calling on such third person to appear before the Judge and state the nature of his claim. (See next Rule.)

Rule 7.

After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the Court or Judge may order to appear, or in case of such third person not appearing when ordered, the Court or Judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding Rules of this Order, and may bar the claim of such third person, or make such other Order as such Court or Judge shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as the Court or Judge shall think just and reasonable.

This Rule is copied from the 30th section of the Common Law Procedure Act, 1860.*

This Rule provides for a summary adjudication by the Judge upon the claims of a third party to liens and charges upon debts sought to be attached by the execution creditor, and gives a power of barring such claims, *i.e.*, claims to such liens and charges, as between such third person and the garnishee, but not of barring a debt claimed by such third person against the execution debtor.†

* For an instance of the application of this section, see *Mitchell v. Lee*, L. R., 2 Q. B., 259. † Day's Common Law Procedure Acts, p. 371.

Order XLV.,
Rule 8.

Rule 8.

Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a discharge to him as against the judgment debtor, the amount paid or levied, although such proceeding may be set aside or the judgment reversed.

The Rule is copied *verbatim* from the 65th section of the Common Law Procedure Act, 1854.

See a form of plea of payment to a judgment creditor of the plaintiff in an order of attachment of debt in Bullen and Leake's "Practice" and in *Lockwood v. Nash*.†

Rule 9.

There shall be kept by the proper officer a debt attachment book, and in such book entries shall be made of all attachments and proceedings thereon, with names, dates, and statements of the amount recovered, and other particulars, and copies of any entries made therein may be taken by any person upon application to the proper officer.

The Rule is founded on section 66 of the Common Law Procedure Act, 1854, which, however, provides for the keeping of three debt attachment books at the offices of the Masters of Q. B., C. P. & Ex.‡

Section 92 of the Principal Act, *supra*, would provide for the transfer to the Supreme Court of these three debt attachment books.

Rule 10.

The costs of any application for an attachment of debt and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court or a Judge.

The Rule is copied *verbatim* from the 67th section of the Common Law Procedure Act, 1854.§

See Order LV., and the Rules of the Supreme Court (Costs), *infra*.

ORDER XLVI.

CHARGING OF STOCK OR SHARES AND DISTINGUISHING.

Rule 1.

An order charging stock or shares may be made by any Divisional Court, or by any Judge, and the pro

* Page 494, 3rd edition.

† 18 C. B., 536.

‡ See, as to the form of this book in the C.P., the first edition work, p. xxii.

§ See *Wintle v. Williams*, 3 H. & N., 288.

ings for obtaining such order shall be such as are directed, and the effect shall be such as is provided by 1 & 2 Vict. c. 110, secs. 14 and 15, and 3 & 4 Vict. c. 82, sec. 1. Order XLVI.,
Rule 1.

The 14th section of the 1 and 2 Vict. provides as follows:—"If any person against whom any judgment shall have been entered up in any of Her Majesty's Superior Courts at Westminster shall have any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge of one of the Superior Courts,* on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order." The stock, it will be seen, must be held by the judgment-debtor "in his own right or in the name of some person in trust for him."

Where a father transferred, without consideration, into the name of his son £1,000 stock of the London General Omnibus Company, to qualify him as a director of the company, and the son re-transferred the stock into his father's name and never derived any beneficial interest from it, *Malins, V.C.*, discharged an order charging the stock with £3,000 and interest, in respect of calls upon the son in another company.†

S. 15 provides as follows:—"Every order of a Judge charging any government stock, funds, or annuities, or any stock or shares in any public company, under this Act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any government stock, funds, or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and Company of the Bank of England from permitting a transfer of such stock in the meantime and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorised agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer

* See *Hopewell v. Barnes*, 1 Ch. D., 630; 33 L. T., 777; 24 W. R., 629 1 Charley's Cases (Court), 1, cited *infra*.

† *In Re The Blakely Ordnance Company*, 35 L. T., 617; 25 W. R., 111 W. N., 1876, p. 290.

Order XLVI. shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, that unless the judgment debtor shall within a time to be mentioned in such order show to a Judge of one of the said Superior Courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute; provided that any such Judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge any such order and to award such costs upon such application as he may think fit.*

Rule 1.

Section 1 of the 3 and 4 Vict. c. 82, declares that *reversionary interests*, as well as interests in possession, and *the annual produce*, as well as the principal, shall be chargeable under the 1 and 2 Vict. c. 110, that funds standing in the name of the Accountant-General shall be chargeable, as if standing in the name of a trustee for the judgment debtor; but that the Judge's order shall not prevent the Bank of England from permitting a transfer of such last-mentioned funds as the Court of Chancery might direct.

"By any Judge." A Chancery Judge has now jurisdiction to enforce a Common Law Judgment, under this Rule. Before he had not.†

An Order was made by a Chancery Judge,† charging railway shares of the plaintiff with the defendant's costs of suit, although not actually taxed.§ In this case the plaintiff's Bill had been dismissed with costs.

Where a judgment has been recovered in a Common Law Division against a person interested in a fund standing to the credit of a cause in the Chancery Division, a stop order will now be granted to the judgment creditor by a Judge of the Chancery Division, without a preliminary charging order having been obtained in the Common Law Division in which the judgment was recovered.||

A judgment directing payment of a sum certain on a future day may be enforced under this section.¶

Rule 2.

Any person claiming to be interested in any stock transferable at the Bank of England standing in the name of any other person may sue out a writ of *distringas* pursuant to the statute 5 Vict. c. 8,** as heretofore. Such writ to be issued out of any office of the High Court in London where writs of summons are issued.

* An appeal lies to the Court, after the order has been made absolute: *Fowler v. Churchill*, 2 Dowl., N. S., 562.

† *Miles v. Pressland*, 4 My. & C., 431. See, also, *Cragg v. Taylor*, L. R., 1 Ex., 148.

‡ Hall, V.C.

§ *Burns v. Irving*, 3 Ch. D., 291; 46 L. J. (Ch.), 423; 34 L. T., 752; 25 W. R., 66.

|| *Hopewell v. Barnes*, 1 Ch. D., 630; 33 L. T., 777; 24 W. R., 629; 2 Charley's Cases (Court), 1.

¶ *Bagnall v. Charlton*, 36 L. T., 750.

** Sic: c. 5.

The 5 Vict. c. 5, provides as follows:—

“ It shall be lawful for the Court of Chancery,* upon the application of any party interested, by motion or petition, in a summary way without bill filed, to restrain the Governor and Company of the Bank of England, or any other public company, whether incorporated or not, from permitting the transfer of any stock in the public funds, or any stock or shares in any public company which may be standing in the name or names of any person or persons, or body politic or corporate, in the books of the Governor and Company of the Bank of England, or in the books of any such public company, or from paying any dividend or dividends due or to become due thereon ; and every order of the Court of Chancery upon such motion or petition as aforesaid, shall specify the amount of the stock or particular shares to be affected thereby, and the name or names of the person or persons, body politic or corporate, in which the same shall be standing: provided always, that the Court of Chancery shall have full power, upon the application of any party interested, to discharge or vary such order, and to award such costs upon such application as to the said Court shall seem fit. A writ of *distringas*, in the form set out in the first Schedule to this Act, shall be issuable from the Court of Chancery, and shall be sealed at the *subpœna* office.”

Ord. XLVI.,
Rule 2.

The form contained in the first Schedule is as follows:—

“ Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriffs of London, greeting : We command you that you omit not, by reason of any liberty, but that you enter the same and distrain the Governor and Company of the Bank of England by all their lands and chattels in your bailiwick, so that they or any of them do not intermeddle therewith until we otherwise command you ; and that you answer us the issues of the said lands, so that they do appear before us in our High Court of Chancery on the day of , to answer a certain Bill of Complaint lately exhibited against them and other defendants before us in our said Court of Chancery by complainant ; and further to do and receive what our said Court shall then and there order in the premises. Witness Ourself at Westminster, the day of in the year of Our reign.

“ DEVON.”

The practice is prescribed by Order XXVII. of the Consolidated Orders of the Court of Chancery.†

ORDER XLVII.

WRIT OF SEQUESTRATION.

Where any person is by any judgment directed to pay money into Court, or to do any other act in a limited time, and after due service of such judgment refuses or neglects to obey the same according to the exigency thereof, the

* Any division of the High Court can now exercise this jurisdiction, as against the Bank of England.

† See Morgan and Chute's Chancery Acts and Orders, 4th edition, pp. 508-510.

Ord. XLVII. person prosecuting such judgment shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery has heretofore had, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration have heretofore been dealt with by the Court of Chancery.

As to the rise and progress of sequestration, see North's *Life of Lord Guildford*, vol. II., p. 73. As to the struggles of the Common Law Courts against sequestration, see Hinde, 128; Gilbert, *For. Rem.*, 78; 3 Swanton, 279, n.

This Order is taken from the 3rd Rule of the Chancery Order of the 7th of January, 1870, which repeals (Rule 2) the Consolidated Order XXIX.

See a form of the writ of sequestration in Appendix (F), No. 10, *infra*, which, from the words, "Know ye," to the end, is an *exact copy* of the form hitherto in use in Chancery.

See also, as to this writ, Order XLII., Rules 2, 4 and 6, *supra*.

The commissioners, of whom there are usually *four*, need not be professional persons, but care should be taken that they are persons able and willing to account for what comes into their hands; they are nominated by the party on whose behalf the writ is issued, and are allowed sometimes a poundage, sometimes a lump sum.

There are writs of sequestration on *mesne process* (to enforce appearance, &c.), and writs of sequestration on *final process*, to enforce decrees and orders. It is to the latter only that this Rule relates.

Originally the writ of sequestration was merely used as a means of coercing the defendant by keeping him out of possession of his property. The practice of applying the money received by the sequestration in satisfaction of the sum decreed to be paid is of comparatively modern origin. See *Wharam v. Broughton*.^{*} This, however, had become the usual method of proceeding in Chancery.[†] The decree or order served upon the defendant had an indorsement, warning him that if he did not obey it within the time limited he would be liable to have his property sequestered.[‡]

"Pay money into Court." By Order XLII., Rule 2, *supra*, it is expressly provided that "a judgment for the payment of money into Court may be enforced by writ of sequestration."

"The proceeds may be dealt with, &c." The sequestrators, under the Chancery process, must not remove anything from the premises without the

^{*} 1 Ves. Sen., 182.

[†] Daniel's Chancery Practice, p. 892.

[‡] Consolidated Order XXIII., 10, as varied by the Order of the 7th January, 1870.

special leave of the Court: * if they do, they will be liable to an attachment.† Ord. XLVII.
If a sale is wanted, an application for permission to sell must be made by summons or motion, and usually upon notice.‡ The Court will order the sale of goods,§ but not of terms of years, or any other property the title to which passes otherwise than by delivery, as the sequestrators can give no warranty of title.||

The sequestrators should serve the tenants in possession with a notice to attorn and pay their rents to them.¶ The Court will, upon motion with notice, give the sequestrators power to let the land.** They are bound to make returns from time to time to the Court of what comes into their hands,†† and they may be ordered, on motion with notice, to pass their accounts and pay over their balances.‡‡ The persons desirous of having the proceeds of the sequestration applied under the decree or order must move the Court for that purpose: the sequestrators ought not so to apply the proceeds of their own authority.§§

The person whose property is sequestered can, on clearing his contempt, obtain an order or summons to dissolve the sequestration.||||

ORDER XLVIII.

WRIT OF POSSESSION.

Rule 1.

A judgment that a party do recover possession of any land may be enforced by writ of possession in manner heretofore used in actions of ejectment in the Superior Courts of Common Law.

See a form of this writ (called a writ of *ha. fa.* or of *hab. fac. poss.*) Appendix (F), No. 7, *infra*. It is copied *verbatim* from the word "therefore" to the end from the form given in the Schedule to Reg. Gen., Hil. T., 1853, No. 23. By Order XLII., Rule 3, *supra*, "a judgment for the recovery of land may be enforced by writ of possession."

This is the only form of writ in Appendix (F) to this Schedule which contains the *non omittas* clause peculiar to writs issuing out of the Exchequer.

This Rule does not affect s. 187 of the Common Law Procedure Act, 1852, which is therefore still law.

If there be several tenements in the possession of several tenants, the sheriff must deliver possession of each separately; but if there be several tenements in the possession of one tenant, possession may be given of one in the name of the whole. In order to save the expense of executing this writ, the tenants may attorn to the plaintiff.¶¶

* *Lord Pelham v. Duchess of Newcastle*, 3 Swanst., 290, n.

† *Hales v. Shaftoe*, 1 Ves. Jun., 86. ‡ *Mitchell v. Draper* 9 Ves., 208.

§ *Wharam v. Broughton*, 1 Ves. Sen., 180.

|| *Sutton v. Stone*, 1 Dick., 187. ¶ See *Shaw v. Wright*, 3 Ves., 22, 24.

** *Neale v. Bealing*, 3 Swanst., 304. †† *Desbrow v. Crommie*, Bainb., 272.

‡‡ *Hinde*, 138. §§ 1 Newl., 689.

|||| See *Raclinson v. Stringer*, Reg. Lib. B., 2607.

¶¶ *Archbold's Practice*, pp. 1045, 1046.

Ord. XLVIII., Rule 1. The Rule and Order XLII., Rule 3, *supra*, do not provide for the case of a judgment in ejectment for the defendant. It is apprehended that the 183rd section of the Common Law Procedure Act, 1852, as to the issuing of execution for the defendant's costs in such a case is still, therefore, applicable.

Rule 2.

Where by any judgment any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment shall, without any order for that purpose, be entitled to sue out a writ of possession, on filing an affidavit showing due service of such judgment, and that the same has not been obeyed.

The former practice is laid down by the 182nd, 183rd and 215th sections of the Common Law Procedure Act, 1852.

"Without any order." None was necessary under the old practice.

"On filing an affidavit." This was not requisite under the old practice. Order XLII., Rule 15, *supra*, empowers the party to whom money is payable under a judgment to issue immediate execution; this Rule would appear to give a similar power to issue immediate execution, the only difference being that an affidavit is not necessary under Order XLII., Rule 15, but under this Rule it is.

ORDER XLIX.

WRIT OF DELIVERY.

A writ for delivery of any property other than land or money may be issued and enforced in the manner heretofore in use in actions of detinue in the Superior Courts of Common Law.

See forms of this writ Appendix (F), No. 8, *infra*. They are copied from the Schedule to the Reg. Gen., Mich. Vac., 1854, Nos. 34 and 35, leaving out the *non omittas* clause and the allusion to the stat. 2 Vict. An asterisk should be inserted in the first of the two forms after the words "our said Court." See the instructions to the second of the two forms.

Order XLII., Rule 4, *supra*, prescribes this writ as one of the alternative methods by which the recovery of specific goods may be enforced. The law on this subject will be found in section 78 of the Common Law Procedure Act, 1854:—"The Court or a Judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed; and that, if the said chattel cannot be found, and unless the Court or a Judge should otherwise order, the sheriff shall distrain the defendant by all his lands and

chattels in the said sheriff's bailiwick, till the defendant render such chattel; or at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel: provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs and interests in such action." Order XLIX.

To entitle the plaintiff in detinue to a writ of delivery under this section, the jury must assess the value of the chattel. The Court may review the order of the Judge under this section. The Common Law Divisions are clothed by this section (which is now incorporated in this Act), after judgment in an action of detinue, with the same jurisdiction to compel the return of a chattel as the Court of Chancery.*

The jurisdiction of the Court of Chancery is fully explained in White and Tudor's Leading Cases in Equity.† The Court of Chancery will order the return of specific chattels where the chattels have a *pretium affectionis* to the owner, *e.g.*, heir-looms, articles of curiosity or antiquity, and family pictures; also title-deeds and copies of Court rolls;‡ also articles destitute of peculiar value, in the case where a fiduciary relationship exists between the parties.§

The Common Law Judges are now able to enforce the delivery up of specific chattels by *attachment* and *sequestration*, as well as by this writ (Order XLII., Rule 4, *supra*).

ORDER L.

CHANGE OF PARTIES BY DEATH, &c.

Rule 1.

An action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation or devolution of any estate or title *pendente lite*.

This Rule is a re-enactment of Rule 17 of the Principal Act.

By the 135th section of the Common Law Procedure Act, 1852, it is enacted that the *death* of a plaintiff or defendant shall not cause the action to abate, but it may be continued as thereafter "mentioned." It has been held that this enactment only applies where the cause of action would before it have *survived* to the legal representative, and he could have commenced an action in his representative character. *Flinn v. Perkins*,|| per Crompton, J.

* See also, as to enforcing the specific delivery of goods contracted to be sold, the Mercantile Law Amendment Act, 1856, s. 2.

† *Pusey v. Pusey*, 1 Vern., 273; 1 White & Tudor, 820. In one case a club tobacco box was ordered to be delivered up by an ex-officer of the club, *Fells v. Read*, 3 Ves., 79.

‡ *Brown v. Brown*, 1 Dick., 62.

§ *Wood v. Rowcliffe*, 3 Hare, 304.

|| 32 L. J. (Q. B.), 10.

Order L.,
Rule 1.

By s. 141 of the Common Law Procedure Act, 1852, "the marriage of a woman plaintiff or defendant shall not cause the action to abate, but the action may, notwithstanding, be proceeded with to judgment."

S. 142 of the Common Law Procedure Act provides in effect that, if the assignees (now trustee) in bankruptcy are (is) willing to continue the action, the bankruptcy of the plaintiff *pendente lite* shall not cause the action to abate.

In Chancery, oddly enough, there were no similar enactments, and on the death or bankruptcy of the plaintiff or defendant, or the marriage of the plaintiff or defendant if a female, the suit abated. If, however, there were several plaintiffs or several defendants, and the whole interest of the party dying survived to the co-plaintiffs or co-defendants, as in the case of joint tenants suing or being sued and one dying, the suit did not abate, but might have been continued by or against the survivor, without revivor.* A suit in equity might also become defective by the assignment or creation of an estate or title *pendente lite*, or by its devolution on e.g. a new-born child.

The method of curing the defect or abatement was formerly by bill of revivor, but latterly by an order of course, obtained on exhibiting Counsel's brief, under the provisions of section 52 of the Chancery Amendment Act.

At Common Law (subject to the enactments already cited) abatement by death was cured by a suggestion of the death upon the record, after which the proceedings were continued by or against the legal representative of the party deceased. If the cause of action survived to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, no leave was necessary,† and either party might make the suggestion; but in the case of the death of a *sole plaintiff*, or sole surviving plaintiff, the *leave* of the Court or of a Judge had to be obtained by his legal representative before entering the suggestion. If the *sole defendant* died, it was the plaintiff's turn to make the suggestion, and he had to serve it on the legal representative of the deceased defendant, who then appeared and pleaded to the suggestion, or suffered judgment for default of appearance. If he appeared, the pleadings in the action and upon the suggestion were tried together.‡

If a female plaintiff married *pendente lite*, execution might be issued by the authority of the husband, without any suggestion or writ of revivor: if a female defendant married *pendente lite*, execution might be issued against her alone, or by suggestion or writ of revivor, against her and her husband.§

To enable the assignees of a bankrupt to continue an action commenced by him before becoming bankrupt, it was necessary for the assignees to obtain a Judge's order for the purpose, and to give security for costs.||

The Legislature, while adopting the Common Law rule that an action shall not abate by reason of the death, marriage, or bankruptcy of any of the parties, if the cause of action survive, has, at the same time, adopted the simple form of procedure for substituting for the deceased or the bankrupt, the legal representative or assignees respectively, or for adding

* *Fallowes v. Williamson*, 11 Ves., 306, 309; *Boddy v. Kent*, 1 Mer., 361, 364.

† Common Law Procedure Act, 1852, s. 136.

‡ *Ibid.*, s. 138.

§ *Ibid.*, s. 141.

|| *Ibid.*, s. 142.

the husband, as the case may be, provided by s. 52 of the Chancery Amendment Act, 1852.

Order L.,
Rule 1.

Where an action had abated by reason of the plaintiff's estate having been assigned to trustees under a liquidation by arrangement prior to the commencement of the Supreme Court of Judicature Acts, the Court of Appeal set aside all orders in the suit subsequently made by Malins, V.C., at the instance of the plaintiff as invalid.*

A Chancery suit in which a decree had been made and which had become abated before the Supreme Court of Judicature Acts came into operation, was revived by direction of Hall, V.C., under the old practice.† His lordship intimated that the application in such cases should be made at chambers, and not in Court.

Rule 2.

In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to an action, the Court or a Judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party to the action, or be served with notice thereof in such manner and form as hereinafter prescribed, and on such terms as the Court or Judge shall think just, and shall make such order for the disposal of the action as may be just.‡

This Rule is a re-enactment of the second part of Rule 17 of the Principal Act, "as hereinafter prescribed" being substituted for "as may be prescribed by Rules of Court," in order to adapt the Rule to the present Act.

"If it be deemed necessary." As the action is no longer to abate, as it formerly did in *Equity*, it might be presumed that the action would proceed as if the death, marriage, or bankruptcy, &c., had never occurred, and this was so held by Malins, V.C., in *Jackson v. The North Eastern Railway Company*, where the plaintiff's estate went into voluntary liquidation; but this decision was overruled by the Court of Appeal.§

"As hereinafter prescribed," i.e., by Rule 5 of this Order, *infra*.

On the death of a sole petitioner for payment out of a fund in Court, pending inquiries, Vice-Chancellor Hall ordered that the petition should be continued, under this Rule, by her executors.||

* *Jackson v. The North Eastern Railway Company*, 25 W. R., 518; W. N. 1877, pp. 80 and 105.

† *Crane v. Loftus*, 24 W. R., 93; 1 Charley's Cases (Court), 149.

‡ See *Jackson v. The North Eastern Railway Company*, 25 W. R., 518; W. N., 1877, pp. 80 and 105, per Jessel, M.R., in the Court of Appeal. (But the bankruptcy occurred before the 1st of November, 1875.)

§ *Ubi supra*.

|| *In Re James Atkins' Estate*, 1 Ch. D., 82; 45 L. J. (Ch.), 117; 24 W. R., 39; 1 Charley's Cases (Court), 148.

Order L.,
Rule 2.

Malins, V.C., gave the representatives of a *cestui que trust*, who tenant for life, and whose income had not been fully paid, and who *pendente lite*, the same benefit of a decree against a trustee for breach of trust in making improper investments of the trust fund, as if they had been made parties under this Rule.*

Rule 3.

In case of an assignment, creation, or devolution of an estate or title *pendente lite*, the action may be continued or against the person to or upon whom such estate or title has come or devolved.

This Rule is a re-enactment of the third part of Rule 17 of the Principal Act. See Rule 1 of this Order, *supra*.

Section 52 of the Chancery Amendment Act, 1852, applied to such "devolution" as this Rule mentions.

A petition to wind up a company cannot be assigned *pendente lite*.†

Rule 4.

Where by reason of marriage, death, or bankruptcy or any other event, occurring after the commencement of an action, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action, and such new party or parties, may be obtained *ex parte* on application to the Court or a Judge, upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence.

This Rule is modelled on the 52nd section of the Chancery Amendment Act, 1852.

The application may be made to a Master, and must be made on affidavit of the "change or transmission of interest or liability."‡

Wherever, under the new Rules, an order is to be obtained *ex parte* on

* *Stone v. Bennet*, W. N., 1876, p. 152.

† *In re the Paris Skating Rink Company*, 25 W. R., 701.

‡ *Coe's Practice of the Judges' Chambers*, 67.

application to a Judge, the application need not be made in Court, but an order of course may be obtained. Therefore, on an application to Jessel, M.R., in Court *ex parte* for an order to continue the proceedings against new trustees under the present Rule, the applicant was directed by Jessel, M.R., to apply at the Order of Course Office.* "By obtaining it there," said his lordship, "you will save one-fourth of the expense."

Order L.,
Rule 4.

Where a defendant had presented a petition for liquidation *pendente lite*, and had made default in delivering a defence, so as to entitle the plaintiff to set down the action, under Order XXIX., Rule 10, on motion for judgment, Hall, V.C. (while intimating that the application should have been made at chambers), made an order that the action should be continued against the trustee under the liquidation, in the place of the original defendant, and gave leave to set down the action or motion for judgment against the trustee.†

One of the parties to a Chancery suit commenced before the 1st of November, 1875, was an unmarried lady. She married, *pendente lite*; and then applied, by her next friend, to Bacon, V.C., in Court, *ex parte*, that the proceedings might be carried on against her husband. Bacon, V.C., said that she was clearly entitled to the order, but that she could get it from the Registrar. "There is no necessity," said his lordship, "for making the application to me."‡

In an action which had been set down for trial, Lush, J., at chambers, refused to order the insertion of the name of the trustee in bankruptcy, instead of that of the bankrupt plaintiff; but ordered that the trustee in bankruptcy should give security for costs under the old practice.§ "I think," said his lordship, "that it would be very inconvenient to alter the record."

This Rule applies, however, to the case of a *sole plaintiff* becoming bankrupt, *pendente lite*. Jessel, M.R., in such a case,|| on an application under this Rule *ex parte* by the defendants, made a conditional order for the trustee in bankruptcy to come in and proceed with the action; in the event of his declining to do so, the action was to be dismissed.

In an action by the indorsee of a bill of exchange against the drawer, who had become bankrupt, and suffered judgment by default, Quain, J., at chambers, ordered that the judgment should be set aside, and that the trustee in bankruptcy should be at liberty to defend the action in the name of the bankrupt.¶

In an action in which the sole plaintiff had *pendente lite* presented a petition for liquidation by arrangement, and his estate had been vested in trustees prior to the commencement of the Supreme Court of Judicature Acts, it was held by the Court of Appeal that all orders made by the Court below, subsequent to the commencement of these Acts, at the instance of the plaintiff, were invalid, but that the trustees might obtain an order of course to continue the action.**

* *Roffey v. Miller*, 24 W. R., 109; 1 Charley's Cases (Court), 150. And see *Middleton v. Pollock*, W. N., 1876, p. 250.

† *Walker v. Blackmore*, 11 N. C., 74.

‡ *Darcy v. Whittaker*, 33 L. T., 778; 24 W. R., 244.

§ 1 Charley's Cases (Chambers), 125.

|| *Wright v. The Swindon, Marlborough, & Andover Railway Company*, 4 Ch. Div., 164; 46 L. J. (Ch.), 199.

¶ *Goddard v. Poole and others*, 1 Charley's Cases (Chambers), 126.

** *Jackson v. The North Eastern Railway Company*, 25 W. R., 518; W. N., 1877, pp. 80 and 105.

Order L.,
Rule 8.

Rule 5.

An order so obtained shall, unless the Court or Judge shall otherwise direct, be served upon the continuing party or parties to the action, or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall, from the time of such service, subject nevertheless to the next two following Rules, be binding on the persons served therewith; and every person served therewith, who is not already a party to the action, shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons.

This Rule is taken from s. 52 of the Chancery Amendment Act, 1852.

The words "unless the Court or a Judge shall otherwise direct," confer a power, however, to dispense with service which that enactment withheld.

Rule 6.

Where any person who is under no disability, or under no disability other than coverture, or being under any disability other than coverture, but having a guardian *ad litem* in the action, shall be served with such order, such person may apply to the Court or a Judge to discharge or vary such order at any time within twelve days from the service thereof.

This Rule is taken from Order XXXII., Rule 1, of the Consolidated Orders of the Court of Chancery.

Rule 7.

Where any person being under any disability other than coverture, and not having had a guardian *ad litem* appointed in the action, is served with any such order, such person may apply to the Court or a Judge to discharge or vary such order at any time within twelve days from the appointment of a guardian or guardians *ad litem* for

such party; and until such period of twelve days shall have expired, such order shall have no force or effect as against such last-mentioned person.

Order L.,
Rule 7.

This Rule is copied almost *verbatim* from Order XXXII., Rule 1, of the Consolidated Orders of the Court of Chancery.

ORDER LI.

TRANSFERS AND CONSOLIDATION.

Rule 1.

Any action or actions may be transferred from one Division to another of the High Court, or from one Judge to another of the Chancery Division, by an order of the Lord Chancellor, provided that no transfer shall be made from or to any Division without the consent of the President of the Division.

See Rule 41 of the Schedule to the Principal Act. See also sections 33, 34 and 36 of the Principal Act, s. 11 of this Act, Order V., Rule 4, and Rule 2 of this Order *supra*, and the cases cited under them, and 5 Vict. c. 5, s. 30.

As to transfers to and from District Registries, see Order XXXV., Rules 11-14, *supra*.

Under the former Chancery practice an order for the transfer of the cause from one branch of the Court to another was made, whenever there was a probability of convenience from doing so.*

The Order was made upon motion with notice,† but the consent of the Judge from whom and to whom the cause was to be transferred, and the leave of the Lord Chancellor, or of the Lords Justices,‡ to give notice of the motion, must have been first obtained. The consent and leave were usually given as a matter of course, on the *ex parte* application of Counsel. When leave was given, the motion was placed in the Court paper for the day appointed for the hearing. The order of transfer, when passed and entered, was left with the Record and Writ Clerk for entry in his cause-book.§ A party who, on insufficient grounds, refused to consent to the transfer, might have been ordered to pay the costs of the application.||

The Lord Chancellor or the Lords Justices had power to order the re-transfer of transferred causes.¶

The power of the Lord Chancellor to order the transfer of a cause from one Common Law Division to another is, of course, entirely new. As, under the old practice, the consent of the Chancery Judges from whom

* *Curlewis v. Whidborne*, 10 W.R., 261, L.JJ.

† *Bond v. Barnes*, 2 De G. F. and J., 387.

‡ "The cause, unless removed by some special order of the Lord Chancellor and Lords Justices, shall be attached to the Court of the M.R. or of one of the Vice-Chancellors"; Order VI., Rule 1, of the Consolidated Orders.

§ Braithwaite's Pr., 566.

|| *Cocq v. Hunasgeria Coffee Co.*, L. R., 4 Ch., 415.

¶ *Seton*, 1269; *Sidebottom v. Sidebottom*, 7 W. R., 104, L. C.

Order LI.,
Rule 1.

and to whom the cause was to be transferred, was necessary, so in future the consent of the Presidents of the Divisions from which and to which an action is to be transferred by order of the Lord Chancellor, will be necessary. Actions can be transferred, however, from one *Division* of the High Court to another *Division* of it without the assent of the *Lord Chancellor* under Rule 2 of this Order; but it would seem that a transfer of an action from one *Judge* of the Chancery Division to another *Judge* of that Division can only be effected by an order of the Lord Chancellor. Neither the surviving Lord Justice of Appeal in Chancery (JAMES, L.J.), nor the Court of Appeal have jurisdiction, even with the consent of all parties and both Judges, to order the transfer of a suit instituted in the Court of Chancery before the Supreme Court of Judicature Acts came into operation from one Vice-Chancellor to another. The Lord Chancellor alone has jurisdiction to make such an order.*

The application for it should be made, in writing, to his Secretary, accompanied by the written consents of all the parties. If the parties do not all consent, the application must be made to the Court.†

The present Rule applies to the transfer of petitions, as well as to the transfer of actions, although "actions" only are mentioned in it.‡

An action for damages commenced in the Chancery Division will not be transferred to another Division of the High Court merely on the ground that, being a case for a jury, it would be more conveniently tried in another Division,§ or on the ground that the plaintiff had brought the action in the Chancery Division in order to avoid the operation of the rule that no second action could be brought by him for the same cause of action in a Common Law Division until he had paid the taxed costs of the defendant in a previous action in a Common Law Division.

Mr. Justice Lush decided, at chambers, that a Judge at chambers has no power to order the transfer of an action from a Common Law Division to the Chancery Division. The Lord Chancellor alone, he said, had power to order it.||

This decision may be considered to have been overruled by *Hillman v. Mayhew*,¶ in which the Exchequer Division decided that any Judge of any Common Law Division sitting at chambers has power, with the Lord Chancellor's consent, to order the transfer of an action commenced in any Common Law Division to the Chancery Division. Mr. Justice Lush's principal clerk (Mr. Coe)** considers that this case authorised a Judge at chambers to transfer an action from one Division to another, generally: if so, it overrules another decision of Mr. Justice Lush's,†† that he had no power, sitting at chambers, to order the transfer of an action from the Exchequer Division to the Common Pleas Division.

An application by the defendants for the transfer from a Common Law

* *Re Hutley; Deards v. Putt*, 1 Ch. D., 11; 45 L. J. (Ch.), 79; 33 L. T., 237; 1 Charley's Cases (Court), 151.

† 1 Ch. D., 41; 1 Charley's Cases (Court), 152.

‡ *In Re Boyds' Trust*, 1 Ch. D., 12; 1 Charley's Cases (Court), 153. (By the Court of Appeal).

§ *Cannot v. Morgan*, 1 Ch. D., 1; 45 L. J. (Ch.), 50; 33 L. T., 402; 24 W. R., 91; 1 Charley's Cases (Court), 154.

|| 1 Charley's Cases (Chambers), 126.

¶ 1 Ex. D., 132; 45 L. J. (Ex.), 334; 34 L. T., 256; 24 W. R., 435; 2 Charley's Cases (Court), 107.

** Practice, p. 117.

†† 1 Charley's Cases Chambers), 18.

Division to the Admiralty Division of an action of negligence, arising out of a collision in the Thames was refused by Archibald, J., at chambers; *secus*, if a question of seamanship on the high seas had been involved.*

Order LL,
Rule 1.

Rule 1a.

In the Chancery Division a transfer of a cause from one Judge to another, may, by the same or a separate order, be ordered to be made or to be deemed to have been made for the purpose only of trial or of hearing, and in such case the original and any further hearing shall take place before the Judge to whom the cause shall be so transferred; but all other proceedings therein, whether before or after the hearing or trial of the cause, shall be taken and prosecuted in the same manner as if such cause had not been transferred from the Judge to whom it was assigned at the time of transfer, and as if such Judge had made the decree or judgment, if any, made therein, unless the Judge to whom the cause is transferred shall direct that any further proceedings therein, before or after the hearing or trial thereof, shall be taken and prosecuted before himself or before an Official or Special Referee.

This new Rule was added by the Rules of the Supreme Court, June, 1377. Its object, like that of the new Rule 4a of Order V., was to obviate the inconvenience arising from Mr. Justice Fry having no chamber officials.

Rule 2.

Any action may, at any stage, be transferred from one Division to another by an order made by the Court or any Judge of the Division to which the action is assigned: Provided that no such transfer shall be made without the consent of the President of the Division to which the action is proposed to be transferred.

See Rule 41 of the Principal Act, and section 11 of this Act, *supra*.

See the note s. 36 of the Principal Act, *supra*, for instances of transfers to the Chancery Division of the actions commenced in a Common Law Division.

"Of the Division to which the action is assigned." The jurisdiction

* *The General Steam Navigation Company v. The London and Edinburgh Shipping Company*, 2 Charley's Cases (Chambers), 67.

**Order LI,
Rule 2.**

given by this Rule may be exercised *at chambers* by any Judge of the High Court, who may happen to be sitting there, although he is not a Judge of the Division to which the action is assigned.*

The application ought to be made upon notice. Per Jessel, M. R., *Humphreys v. Edwards*.†

The Judge is to decide under this Rule whether the transfer ought to be directed, but there is no actual transfer "without the consent of the President of the Division to which the action is proposed to be transferred." The consent is formal, if the Judge hearing the summons thinks it a fit cause to be transferred.‡

The Court of Appeal, overruling the decision of the Exchequer Division, ordered that an action, commenced in that Division, to rescind a contract for the sale of land and recover the deposit money, in which the defendant had set up a counterclaim for specific performance of the contract, should be transferred to the Chancery Division, as being the only Division which could give a complete remedy.§

A case in the new trial paper from the Court of Common Pleas, at Lancaster, assigned to the Common Pleas Division, was transferred by that Division to the Exchequer Division, as the rule *nisi* for a new trial had been obtained in the old Court of Exchequer.||

Rule 2a.

When an order has been made by any Judge of the Chancery Division for the winding up of any company under the Companies Acts, 1862 and 1869, or for the administration of the assets of any testator or intestate, the Judge in whose Court such winding up or administration shall be pending shall have power, without any further consent,¶ to order the transfer to such Judge of any action** pending in any other Division, brought or continued by or against such company, or by or against the executors or administrators of the testator or intestate whose assets are being so administered, as the case may be.

This new Rule was added by Rule 18 of the Rules of the Superior Court, June, 1876. It is intended (amongst other things) to put an end to the rather unseemly controversy which arose between the Judges of the Chancery and Common Law Divisions of the High Court, as to the

* *Hillman v. Mayhew*, 1 Ex. D., 132; 45 L. J. (Ex.), 334; 34 L. T., 256; 24 W. R., 435. See the note to Rule 1 of this Order, *supra*.

† 45 L. J. (Ch.), 112.

‡ *Humphreys v. Edwards*, 45 L. J. (Ch.), 112. Per Jessel, M. R.

§ *Holloway v. York*, 2 Ex. D., 333; 25 W. R., 403.

|| *Anon.*, 1 Charleys Cases (Court), 156.

¶ It is "much more convenient" that the motion should be made *ex parte*, than on notice. *Field v. Field*, W. N., 1877, p. 98.

** "Action" does not include a winding up petition. Per Jessel, M. R., in *In re The National Funds Assurance Co. Limited*, W. R., Nov. 11, 1876.

power of a Judge of the Chancery Division to still exercise his old jurisdiction of staying an action against a company at Common Law, when proceedings for winding up the company were pending before him.

Order LI.,
Rule 2a.

See the note to subsection (5) of section 24 of the Principal Act, *supra*.

Instead of applying to a Judge of the Chancery Division, before whom the winding up proceedings are pending, for an injunction to *restrain* an action in one of the Common Law Divisions against the company, the proper course will now be to apply to the same learned Judge to exercise the power of *transferring* the Common Law action to himself, conferred by the new Rule.

In the case of *Field v. Field*,* in which a decree had been made for the administration of the assets of an intestate, Mahns, V. C., ordered the transfer to himself under the present Rule of an action brought against the administratrix of the intestate in the Exchequer Division. The motion was made by the plaintiff in the action in the Exchequer, *ex parte*.

Rule 3.

Any action transferred to the Chancery Division or the Probate Division shall, by the order directing the transfer, be directed to be assigned to one of the Judges of such Division to be named in the order.

This Rule is in accordance with the previous practice of the Court of Chancery, and also with the provisions of s. 42 of the Principal Act, *supra*, that "all business arising in the Chancery Division shall be transacted and disposed of in the first instance by one Judge only."

An action, also, in the Chancery Division must be *marked with the name* of the Judge to whom it is assigned.

See Order V., Rule 4a, *supra*.

Rule 4.

Actions in any Division or Divisions may be consolidated by order of the Court or a Judge in the manner heretofore in use in the Superior Courts of Common Law.

When several actions are brought by *the same plaintiff* against several defendants, and *the questions in dispute and the evidence* to be adduced are *the same* in all, the plaintiff will be put to his election as to which action he will proceed with, and proceedings in the rest will be stayed on the defendants in the other actions submitting to be bound by the verdict in the one to be tried. The practice of thus "consolidating" actions is said to have been originally introduced by Lord Mansfield, C.J., in actions against underwriters.†

The plaintiff will not be prevented by an adverse verdict in the case that is tried from proceeding with any of the other actions,‡ even although the costs in the first are unpaid.§ Where the same solicitor is retained by all the defendants, they are jointly liable to contribute to the payment of the plaintiff's costs.||

* W. N., 1877, p. 98.

† Tidd 614, 9th edn.

‡ *McGregor v. Horsfall*, 3 M. & W., 320

§ *Doyle v. Douglas*, 4 B. & Ad., 544.

|| *Anderson v. Boynton*, 13 Q.B., 308.

**Order LX,
Rule 2.**

given by this Rule may be exercised *at chambers* by any Judge of the High Court, who may happen to be sitting there, although he is not a Judge of the Division to which the action is assigned.*

The application ought to be made upon notice. Per Jessel, M. R., *Humphreys v. Edwards*.†

The Judge is to decide under this Rule whether the transfer ought to be directed, but there is no actual transfer "without the consent of the President of the Division to which the action is proposed to be transferred." The consent is formal, if the Judge hearing the summons thinks it a fit cause to be transferred.‡

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power of a Judge of the Chancery Division to still exercise his old jurisdiction of staying an action against a company at Common Law, when proceedings for winding up the company were pending before him.

**Order LI.,
Rule 2a.**

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This Rule is in accordance with the previous practice of the Court of Chancery, and also with the provisions of s. 42 of the Principal Act, *supra*, that "all business arising in the Chancery Division shall be transacted and disposed of in the first instance by one Judge only."

An action, also, in the Chancery Division must be *marked with the name* of the Judge to whom it is assigned.

See Order V., Rule 4a, *supra*.

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Actions in any Division or Divisions may be consolidated by order of the Court or a Judge in the manner heretofore in use in the Superior Courts of Common Law.

When several actions are brought by *the same plaintiff* against several defendants, and *the questions in dispute and the evidence* to be adduced are *the same* in all, the plaintiff will be put to his election as to which action he will proceed with, and proceedings in the rest will be stayed on the defendants in the other actions submitting to be bound by the verdict in the one to be tried. The practice of thus "consolidating" actions is said to have been originally introduced by Lord Mansfield, C.J., in actions against underwriters.†

The plaintiff will not be prevented by an adverse verdict in the case that is tried from proceeding with any of the other actions,‡ even although the costs in the first are unpaid.§ Where the same solicitor is retained by all the defendants, they are jointly liable to contribute to the payment of the plaintiff's costs.||

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‡ *McGregor v. Horsfall*, 3 M. & W., 320

§ *Doyle v. Douglas*, 4 B. & Ad., 544.

|| *Anderson v. Boynton*, 13 Q.B., 308.

Order LI.,
Rule 4.

A practice somewhat similar to that of the Common Law Courts was sanctioned by the Court of Chancery. Where two suits for the *same object* were instituted in different branches of that Court, an application was generally entertained to stay proceedings in one. If it was desirable to amalgamate the two suits, the Court would do so on conditions.* A defendant in Equity may plead that there is another suit depending in that or in another Court of Equity for the same matter.†

The application should be made by summons before a Master, entitled in all the actions, issued at any time after service of the writs.‡

An application to consolidate two actions by the same plaintiff against the same defendant—one for malicious prosecution, and the other for salary, as a manager, was dismissed by Quain, J., at chambers, with costs.§

Where a motion was made *by the plaintiffs* in seventy-eight actions against the same defendants (in seventy-six of which summonses to dismiss the actions for want of prosecution were pending), to consolidate the actions, or allow further time to take the next step in all but two of the actions, till those two should have been tried, Malins, V. C., while holding that he could only consolidate actions at the instance of *defendants* under the present Rule, acceded to the alternative motion to allow the plaintiffs further time.||

Three actions, arising out of the same building contract, were brought simultaneously in the Common Pleas, Exchequer, and Chancery Divisions respectively, of the High Court—*Smith v. Whichcord* in the Common Pleas, by sub-contractors against the architect; *Evans v. Debenham*, in the Exchequer, by sub-contractors against the person for whom the work was executed; and *Debenham v. Lacey* in the Chancery Division, by the person for whom the work was executed, against the contractor, the sub-contractors, and other persons, who claimed part of the balance in his hands, in order to ascertain who were the parties entitled to this balance. *Evans v. Debenham* was transferred by Pollock, B., to the Chancery Division. On motion, in the Chancery Division, by the person for whom the work was executed and the architect, that the three actions might be consolidated, and ordered to come on for trial together, Hall, V. C., ordered that the three actions should come on for trial together, the evidence in each to be evidence in all.¶

ORDER LII.

INTERLOCUTORY ORDERS AS TO MANDAMUS** INJUNCTIONS, OR INTERIM PRESERVATION OF PROPERTY, &C.

Rule 1.

When by any contract a *primâ facie* case of liability is established, and there is alleged as matter of defence a right

* See Morgan and Chute's Chancery Acts and Orders, p. 393.

† Mitford on Pleading, 246.

‡ Coe's Practice of the Judges' Chambers, 126.

§ 1 Charley's Cases (Chambers), 127.

|| *Amos v. Chadwick*, 4 Ch. D., 869.

¶ 24 W. R., 900.

** "Mandamus Injunctions." The present Order does not deal with "mandamus," except in the reference (Rule 4) to s. 25, subs. (8) of the Principal Act. "Mandamus injunctions" may be a misprint for "mandatory injunctions."

to be relieved wholly or partially from such liability, the Court or a Judge may make an order for the preservation or *interim* custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured.

Order LII.,
Rule 1.

This Rule is a re-enactment of Rule 43 of the Principal Act.

The Rule must be read in connection with Rule 5 of this Order, *infra*.

Rule 3 seems to include any case which could fall under this Rule.* The word "litigation" implies the existence of an action, but Rule 5 contemplates a case arising under this Rule, in which there will be no pleadings.

The existing law as to the subject-matter of this Rule will be found stated under Rule 3.

The *Masters* of the Q. B., C. P., and Ex. Divisions, and the *District Registrars*, are expressly † excluded from exercising the jurisdiction conferred upon a Judge by this Order, and by s. 25, subs. (8) of the Principal Act.

"May order that the amount in dispute be brought into Court." Such an order was made in the case of *Hutchinson v. Hartmont*,‡ for payment by the defendant into Court of the balance of the proceeds of bills placed by the plaintiff in the defendant's hands for the purpose of being discounted; and Jessel, M.R., considering the defendant to be a person acting in a fiduciary capacity within the meaning of s. 4 of the Debtors' Act, 1869, made an order for the attachment of the defendant for contempt in not paying the money into Court, as ordered.

Rule 2

It shall be lawful for the Court or a Judge, on the application of any party to any action, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as to the Court or Judge may seem desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once.§

* For other instances of seemingly tautological enactments in this Schedule, see Order XXVII., Rules 1 and 6, Order XXXI., Rules 11, 12, and 14, Order XXXIV., Rules 1 and 2, *supra*.

† Order LIV., Rule 2; Order XXXV., Rule 4.

‡ W. N., 1877, p. 29; 12 N. C., 52.

§ An illustration of the application of the principle of this Rule occurred (on the 31st August, 1875), in the case of *Griffiths v. Miller*. Mr. Baron Bramwell made an order for the *sale of growing crops*, the sheriff (it was an interpleader case) paying the proceeds of the sale into Court, and the claimant proceeding to trial. The growing crops would otherwise, it is believed, have perished. (See s. 13 of the C. L. Pro. Act, 1860.)

710 SUPREME COURT OF JUDICATURE ACT, 1875.

Order LII.,
Rule 2.

This Rule is a re-enactment of Rule 44 of the Principal Act.
This Rule must be read in connection with Rule 4 of this Order, *infra*.
No order under the present Rule is necessary for the sale of a horse received by the plaintiff in part payment by the defendant for another horse, in an action for breach of warranty of the former horse. Per Quain, J., at chambers.* “You can sell it,” said his lordship, “if you choose to do so, without any order.”

Rule 3.

It shall be lawful for the Court or a Judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for the DETENTION, PRESERVATION, OR INSPECTION of any property, being the subject of such action, and for all or any of the purposes aforesaid to authorise any person or persons to enter upon or into any land or building in the possession of any party to such action, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

See the note to Rule 1 of this Order. The present Rule is a re-enactment of the first portion of Rule 45 of the Principal Act. The second portion of that Rule will be found under Order XXXVII., Rule 4, *supra*.

This Rule is very wide and beneficial in its scope. It must be read in connection with Rule 4 of the Order, *infra*.

“Detention.”—This is more fully expressed in Rule 1 of this Order—“the Court or a Judge may make an order for the *interim* custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured.” The “*interim custody*” would point to the nomination of a Receiver *pendente lite*, to secure the property for the benefit of the person who shall ultimately appear to be entitled to it, without affecting the right to it.† The Court of Chancery extended the principle of providing for the safety of property pending litigation by the appointment of a Receiver to cases where the litigation was in another Court; *e.g.*, in the Probate Court,‡ the Divorce Court,§ or a foreign Court.|| The Probate Court (see the Probate Act, 1857, s. 71), and the Divorce Court will in future, it is apprehended, appoint the Receiver in these cases themselves.

* 1 Charley's Cases (Chambers), 127.

† See *Skip v. Harwood*, 3 Atk., 564, per Lord Hardwicke, C.

‡ See Kerr on Receivers, 20-26. Mitford on Pleading, 135, 136.

§ *Sydney v. Sydney*, W. N. 1867, p. 248.

|| *The Transatlantic Company v. Pietroni*, Johns., 604.

One of the most ordinary methods by which the Court of Chancery enforced the jurisdiction of retaining property *pendente lite* was by ordering it to be *brought into Court*. The payment of money or the transfer of stock into Court was most usually ordered, on interlocutory application, in the case of persons filling a fiduciary position having money in their hands or stock under their control to which the plaintiff could make out a *prima facie* title.* (See Rule 1.)

The Court of Chancery would also, wherever it might be necessary for their protection, order specific chattels to be deposited in the Bank of England, which has the general custody of the property of suitors.†

“Preservation.”—An interlocutory injunction was a mode by which the Court preserved the property in dispute *pendente lite*, with the least injury to all parties. The object of this injunction was to maintain the subject-matter of the suit in *statu quo* until a decision could be had on the legal right to it of the party suing.‡ The plaintiff must have shown at least a strong *prima facie* case in support of the title which he asserted.§ (See Rule 1 of this Order, *supra*.) The Court would not, except under very special circumstances, have granted upon an interlocutory application before decree, a *mandatory* injunction, virtually directing the defendant to perform the act, so as to keep things, until the hearing, in the state in which they were *ante litem motum*.|| Under the present Rule and subsection (8) of s. 25 of the Principal Act, *supra*, mandatory injunctions will, no doubt, be more frequently applied for and obtained.

“Inspection.”—At Common Law a rule could have been obtained, directing a *view* to be had by a jury, whether common or special, of the messuages, lands, and place in question,¶ in actions of a local nature, such as trespass *qu. cl. fr.*, and nuisances.** No motion was necessary; the rule being drawn up by the officer of the Court, on an affidavit, stating the place, and the distance, and on the deposit of an amount sufficient to cover the expenses of the view.††

Either party to an action at Common Law might also have applied to a Court or a Judge for a rule or an order for the inspection by the jury, by himself, or by his witnesses, of any real or personal property the inspection of which might be material.‡‡ The proceedings were the same as on a view. The removal of obstructions to inspection might have been ordered as incident to it.§§

The Court of Chancery also issued orders for the inspection of real property.||||

Under the 42nd sect. of the 15 and 16 Vict., c. 83, an order for the inspection of the defendant's machinery might have been made in an action for infringing a patent. The Court of Exchequer in *The Patent Type*

* *Danby v. Danby*, 5 Jur., N. S., 54. *Whitmore v. Turquand*, 1 J. & H., 296.

† Daniel's Chancery Practice, pp. 1627, 1628, 1632.

‡ *Lawrence v. Austin*, 11 Jur., N. S., 576, 577.

§ Daniel's Chancery Practice, p. 1487.

|| See as to mandatory injunctions, Kerr on Injunctions, 230-232, 320-321, 533-535.

¶ Common Law Procedure Act, 1852, s. 114.

** *Stones v. Menhem*, 2 Ex. 382, per Parke, B.

†† Reg. Gen. Hil. T., 1853, Rules 48 and 49.

‡‡ Common Law Procedure Act, 1854, s. 58.

§§ *Bennett v. Griffiths*, 3 E. and E., 467.

|||| *Ednor v. Barwell*, 1 De G. F. and J., 529.

**Order LII.,
Rule 3.**

Founding Co. v. Lloyd,* refused an order for the inspection and delivery, for the purpose of analysis, of a portion of the type used by the defendant. The order was subsequently made by the Court of Chancery.† Such a conflict of decision cannot arise in the Supreme Court.

In an action of trespass against an adjoining colliery owner an order was made under this Rule by Lindley, J., at chambers, for inspection of that part of the defendant's mine which lay under or near the mine of the plaintiff, and to measure the coal taken away under the plaintiff's land. An order of this kind will be granted almost as a matter of course. An order to inspect the whole of the defendant's mines, to remove barriers, and take samples, was, however, refused by the same learned Judge.‡

In *Velati and Company v. Braham and Company*,§ the Common Pleas Division made an order, under the present Rule, for the deposit by the defendants in the Master's Office of some jewellery alleged to have been left with the defendants by the plaintiffs' agent as security for a loan by the defendants to the plaintiffs, but which the defendants alleged to have been left with them as security for a loan to the individual whom the plaintiffs asserted to be their agent.

Rule 4.

An application for an order under section 25, subsection (8), of the Act, or under Rules 2 or 3 of this Order, may be made to the Court or a Judge by any party. If the application be by the plaintiff for an order under the said subsection (8), it may be made either *ex parte* or with notice, and if for an order under the said Rules 2 or 3 of this Order, it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application.

By subsection (8) of section 25 of the Principal Act, *supra* (which is "*the*" Act), a mandamus or an injunction may be granted, or a receiver appointed, by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient that such an Order should be made."||

See *Pease v. Fletcher*,¶ *H. v. H.*,** *Sargent v. Read*,†† and *Taylor v.*

* 5 H. and N., 192.

† *Patent Type Founding Co. v. Walter, Johns.*, 727.

‡ *Cooper v. The Ince Hall Company*, 2 Charley's Cases (Chambers), 67.

§ 46 L. J. (C. P.), 415.

|| See *In Re The Paris Shating Rink Company, Limited* (No. 2), 25 W. R., 767.

¶ 1 Ch. D., 273; 45 L. J. (Ch.), 265; 1 Charley's Cases (Court), 35.

** 2 Charley's Cases (Court), 80.

†† *Ib.*, 81.

Eckersley,* and the Chamber Cases, cited under subsection (8) of section 25 of the Principal Act, *supra*.

Order LII.,
Rule 4.

On an *ex parte* application, Hannen, J., the President of the Probate Division, granted an injunction on motion *ex parte*, to restrain a bank from handing over to the defendant cash and bonds payable to bearer which had been deposited with the bank pending an action for the revocation on the ground of fraud of the probate of the will under which the defendant claimed them as legal personal representative of the testator. The plaintiff had drawn up a notice of motion for the appointment of an administrator *pendente lite*, but it was stated that before the plaintiff could effect personal service of the notice of motion, the bank would have handed over the property to the defendant.†

The Probate Division, in *Nicholas v. Dracachis*,‡ with the consent of all parties, made an order *pendente lite*, to restrain any person from dealing with shares in a ship which formed the principal part of the property of a testator, who had left the plaintiff a legacy; but to whom the defendant had taken out administration, on the supposition that he died intestate.

Sir Robert Phillimore granted an injunction *ex parte* to restrain the defendant from dealing, and the Registrar from registering any dealing, in shares of a ship, the subject of a co-ownership action, *pendente lite*.§

Jessel, M.R., refused an application on affidavit and *ex parte*, for an order to restrain the defendant—a married woman—from dealing with her separate estate, and for the appointment of a receiver *pendente lite*. The plaintiffs were the holders of a promissory note made by the defendant, and sought payment of the amount of the note out of her separate estate, which she had power to alienate.||

The plaintiff should indorse his writ with a claim for an injunction, or a receiver, when the obtaining of either is a substantial object of his action.¶

When it is necessary to serve a writ out of the jurisdiction, the order made under Order II., Rule 4, will provide for the issuing of an injunction, if it should be applied for *ex parte*. The affidavit in support of the application for leave must go to the merits sufficiently to entitle the plaintiff to the injunction.**

The Court of Appeal on notice of motion and affidavit, appointed the appellant, who was plaintiff in an action for specific performance of an agreement to accept a lease of a farm, receiver and manager of the farm without security, although no previous application had been made by him for that purpose to the Court below. The affidavit stated that “the farm was in very bad condition and daily getting worse.” ††

“After notice to the defendant.” In a case of emergency, an immediate order for inspection, and for permission to take samples under Rule 3 will be granted *ex parte*. Per Malins, V.C., in *Hennessey v. Bohmann, Osborne and Company*,‡‡ which was an action for an injunction to restrain the defendants from selling brandy falsely labelled to represent the plaintiffs’ brandy. In that case it was urged by the plaintiffs on a motion, *ex parte*, that, if notice were given of the application, its object might be defeated, as the defendants might remove the bottles and cases

* 2 Charley’s Cases (Court), 84.

† *Meluish v. Milton*, 24 W. R., 679.

‡ 1 P. D., 72.

§ *The “Horlock,”* 36 L. T., 622.

|| *The National Provincial Bank v. Thomas*, 11 N. C., 154.

¶ *Coleborne v. Coleborne*, 1 Ch. D., 690. ** *Young v. Brassey*, 1 Ch. D., 277.

†† *Hyde v. Warden*, 1 Ex. D., 309. ‡‡ 36 L.J., 51; W. N., 1877, p. 14.

**Order LII,
Rule 4.**

which the plaintiffs wished to inspect, and from which they sought to take the samples.

“ At any time after appearance by the party making the application.”
In an action for obstruction of light and air, it was held by Archibald, J., at chambers, that, prior to inspection of the plaintiff's premises under this Rule, the defendant must deliver his statement of defence, in order that it may be seen whether the defence is that there is no obstruction, or that the plaintiff has no ancient lights.*

Rule 5.

An application for an order under Rule 1 may be made by the plaintiff at any time after his right thereto appears from the pleadings ; or, if there be no pleadings, is made to appear by affidavit or otherwise to the satisfaction of the Court or a Judge.

See Rule 1 of this Order, and the note thereto, *supra*, and *Hutchinson v. Hartmont*.†

Rule 6.

Where an action is brought to recover, or a defendant in his statement of defence seeks by way of counterclaim to recover specific property other than land, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property, by virtue of a lien or otherwise, as security for any sum of money, the Court or a Judge may, at any time after such last-mentioned claim appears, from the pleadings, or, if there be no pleadings, by affidavit or otherwise to the satisfaction of such Court or Judge, order that the party claiming to recover the property be at liberty to pay into Court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as such Court or Judge may direct, and that upon such payment into Court being made, the property claimed be given up to the party claiming it.

The practice under this Rule is new. Under section 25 of the Common Law Procedure Act, 1860, a sum of money, to the value of the goods alleged

* 2 Charley's Cases (Chambers), 68.

† W. N., 1877, p. 29 ; 12 N. C., 52.

to have been detained, might have been paid into Court by the defendant in an action of detinue.

Order LII.,
Rule 6.

ORDER LIII.

MOTIONS AND OTHER APPLICATIONS.

Rule 1.

Where by these Rules any application is authorised to be made to the Court or a Judge in an action, such application, if made to a Divisional Court or to a Judge in Court, shall be made by motion.

By Order LVIII., Rule 18, *supra*, applications to a Judge of the Court of Appeal shall also be by motion.

"Whenever," says Mr. Daniel, "it becomes necessary to apply to the Court for its interference in a matter arising in a cause or proceeding, the application is made by motion or *petition*."* "There does not appear," he adds, "to be any very distinct line of demarcation between the cases in which an application to the Court in a pending cause or matter should be made by motion and those in which it should be made by petition; but, as a general rule, where any long or intricate statement of facts is required, the application should be made by *petition*, while in other cases a motion will be sufficient."† The present Rule does not say that henceforth applications shall in no case be made by *petition* in the Chancery Division, but only that applications *under these Rules* shall be made by motion.

In the Common Law Courts the present Rule does not, it is apprehended, introduce any change of practice.

"In an action." See, as to this qualification, the note to Rule 2 of this Order, *infra*, and the cases there cited.

Rule 2.

No rule or order to show cause shall be granted in any action, except in the cases in which an application for such rule or order is expressly authorised by these Rules.

This is a very important change in Common Law practice. The Judicature Commission recommended‡ that "when the Judge at the trial has reserved any question of law, he should have power to direct the cause to be set down for argument before the Court *without a rule nisi*."

"In the Courts of Equity, the practice," says Dr. Stephen,§ "has hitherto been to proceed, *in the first instance*, to a hearing of the parties on both sides, requiring, however, him by whom the motion is made to give *notice*|| to his adversary of the nature and time of the intended application." The present Rule is an assimilation, *pro tanto*, of the Common

* Chancery Practice, p. 1434.

† Citing *Jones v. Roberts*, 12 Sim., 189; and *Lord Shipbrooke v. Lord Hinchinbrooke*, 13 Ves., 394.

‡ First Report, p. 15.

§ 3 Stephen's Comm., 7th edn., p. 628 n. (c.)

|| Special *ex parte* motions were made *without notice*.

**Order LIII.,
Rule 2.**

Law to the Chancery practice. There were, however, "orders *nisi*" in Equity, and there were also at Common Law rules obtained upon motion, which were absolute in *the first instances*. The only general principle laid down by Common Law text writers on the subject was, that "all rules to *set aside proceedings* for irregularity or otherwise, were rules *nisi*."*

A case in which the application for a rule or order to show cause has been "expressly authorised by these Rules" will be found in Order XXXIX. Order XL., Rule 6, *supra*, afforded another illustration, but it has been repealed † by the Rules of the Supreme Court, December, 1876. The principle that "no rule or order to show cause shall be granted in any action" has been considerably extended by those Rules, which are based upon s. 17 of the Appellate Jurisdiction Act, 1876. See the notes to Order XL., *supra*.

"In any action." This is an important qualification. A rule *nisi* was granted (without notice) in an arbitration, where there was no action, calling upon the party against whom an award had been given to pay the amount awarded. The present Rule applies only to actions. ‡

An application for the assignment of an administration bond is not a proceeding in any action within the meaning of the present Rule. It falls under the old practice. The proceeding must, therefore, be by rule *nisi*, without notice to the sureties. §

A Judge of the High Court of Justice, sitting at chambers, has no power to make, on the day on which a Divisional Court of Appeal from Inferior Courts sits, an order to show cause before that Court why the judgment given in an action in a County Court should not be set aside. 38 & 39 Vict. c. 50, s. 6. *Brown v. Shaw*. ||

Rule 3.

Except where by the practice existing at the time of the passing of the said Act any order or rule has heretofore been made *ex parte* absolute in the first instance, and except where by these Rules it is otherwise provided, and except where the motion is for a rule to show cause only, no motion shall be made without previous notice to the parties affected thereby. But the Court or Judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms

* See Archbold's Practice, p. 1578.

† See *Robinson v. Robinson*, 24 W. R., 675, decided on Order XL., Rule 6, before its repeal.

‡ *In Re Phillips and Gill*, 1 Q. B. D., 78; 45 L. J. (Q. B.), 136; 24 W. R., 158; 1 Charley's Cases (Court), 157. See Order I., Rule 3, *supra*.

§ *In the goods of Cartwright*, 34 L. T., 72; 24 W. R., 214.

|| 1 Ex. D., 425. "The Orders and Rules of the Supreme Court of Judicature Acts do not apply to such a case." Per Bramwell, B., *ib*.

as to costs or otherwise, and subject to such undertaking, if any, as the Court or Judge may think just; and any party affected by such order may move to set it aside. Order LIII.,
Rule 8.

Mr. Daniel says* that "it is impossible to lay down any clear rule defining such [special] motions as may be made *ex parte* in Equity, and distinguishing them from such as require notice." He gives, however, a list of motions which may be made *ex parte* in Appendix I., Part I., to his "Chancery Practice."

As to rules absolute in the first instance, at Common Law, see the note to Rule 2 of this Order, *supra*. A "motion of course" in Equity required no notice, as no opposition was allowed to it.† A list of these motions of course will be found in Daniel's "Chancery Practice," Appendix I., Part II.‡

Examples of rules absolute in the first instance are given by Reg. Gen. Hil. T., 1853, Rule 168.

As to a "rule to show cause only," see Order XXXIX., and Order XL., Rule 6 (repealed).

A notice of motion for judgment under Order XXIX., Rule 10, and this Rule is to be served by delivering it to the defendant's solicitor if the defendant has appeared, but if the defendant has *not* appeared, by filing it with the proper officer, under Order XIX., Rule 6.§

Where notice was given by one party that they would move the Court to rescind a Judge's order, and they did not move pursuant to notice, but the other party appeared to show cause, the Court ordered the former to pay to the latter his costs of appearing to show cause.||

If the notice of motion, however, is obviously bad on the face of it, as where the day fixed for the motion falls on a day on which there cannot be any sittings, or when according to law the notice is too short, the party to whom the notice is given ought not to appear. If he does, he will not be allowed his costs of so appearing.¶

In cases of emergency receivers have been appointed and injunctions issued on motions *ex parte*. In *H. v. H.*,** a receiver was appointed *ex parte* before service of the writ, where the bankruptcy of trustees and consequent loss of the trust estate was anticipated, the parties applying agreeing to accept any notice of motion to discharge the order, and to inform the other party of this undertaking.†† Numerous other instances of motions *ex parte* for receivers, and also instances of motions *ex parte* for injunctions will be found under subs. (8) of s. 25 of the Principal Act, *supra*.

* Chancery Practice, p. 1439. † See *Eyles v. Ward*, Mos., 255.

‡ But petitions of course to the Rolls are now substituted for motions of course. See a list of such petitions, Daniel's Chancery Practice, Appendix II.

§ *Dymond v. Croft*, 3 Ch. D., 512; 45 L. J. (Ch.), 612; 35 L. T., 29; 24 W. R., 700; *Morton v. Miller*, 3 Ch. D., 516; 45 L. J. (Ch.), 613; 24 W. R., 723.

|| *Berry v. The Exchange Trading Company*, 1 Q. B. D., 77; 45 L. J. (Q. B.), 224; 24 W. R., 318.

¶ *Daubney v. Shuttleworth*, 1 Ex. D., 53; 45 L. J. (Ex.), 177; 34 L. T., 357; 24 W. R., 321. See and compare *Brown v. Shaw*, 1 Ex. D., 425.

** 1 Ch. D., 276; 24 W. R., 217; 2 Charley's Cases (Court), 80.

†† See and compare *Gardiner v. Hardy*, W. N., 1876, p. 185.

Order LIII,
Rule 4.

Rule 4.

Unless the Court or Judge give special leave to the contrary, there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion.

By the Reg. Gen. Hil. T., 1853, Rule 160, "rules to show cause shall be no stay of proceedings unless *two days' notice of the motion shall have been served* on the opposite party, except in the cases of rules for new trials, or to enter verdict, or nonsuit, motions in arrest of judgment, or for judgment *non obstante veredicto*, to set aside award or annuity deed, or to enter a suggestion, or by the special direction of the Court." The present Rule sweeps away all the exceptions but the last. The Rule is copied *verbatim* from Order XXXIII., Rule 2, of the Consolidated Orders of the Court of Chancery.

See *Crom v. Samuels*,* *Fox v. Wallis*,† and *Deykin v. Coleman*,‡ as to notices of motion on appeal from chambers, under Order LIV., Rule 6. "The day named must be a day when the motion can be heard, not a day, for example, in vacation, when the Court does not sit."

"Two clear days between." A notice of motion given on the 20th of December for the 22nd December is bad, and "the Court has no more power to amend the notice of motion by altering the day named than it has to pass an Act of Parliament." Per Kelly, C.B., in *Daubney v. Shuttleworth*.§

The provision of this Rule, that "two clear days notice" of motion must be given, applies to notices of motion for judgment, where the defendant has made default in pleading, and the plaintiff is entitled to set down the action on motion for judgment, under Order XXIX., Rule 10.||

Rule 5.

If, on the hearing of a motion or other application, the Court or Judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or Judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given upon such terms, if any, as the Court or Judge may think fit to impose.

As to bringing in additional parties, see Order XVI., *supra*. As to notice, see Rule 3 of this Order, *supra*.

* 2 C. P. D., 21; 46 L. J. (C. P.), 1; 35 L. T., 423; 25 W. R., 45.

† 2 C. P. D., 45; 35 L. T., 690; 25 W. R., 287.

‡ 36 L. T., 195; 25 W. R., 294.

§ 1 Ex. D., 53; 45 L. J. (Ex.), 177; 34 L. T., 357; 24 W. R., 321.

|| *Russell v. Parsons*, 34 L. T., 56; 24 W. R., 269.

Rule 6.

Order LIII.,
Rule 6.

The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or Judge shall think fit.

In Equity Counsel might, as it was termed, "save" his notice of motion till the next motion or "seal" day.* If not made or "saved" before the Court had disposed of the motions on the day for which the notice was given, a motion was, in Equity, considered to be *abandoned*.†

Rule 7.

The plaintiff shall, without any special leave, be at liberty to serve any notice of motion or other notice, or any petition or summons upon any defendant, who, having been duly served with a writ of summons to appear in the action, has not appeared within the time limited for that purpose.

This Rule is in accordance with the previous Chancery practice. It is copied almost *verbatim* from Order III., Rule 8, of the Consolidated Orders of the Court of Chancery. That Rule did not, however, apply where the defendant was out of the jurisdiction. *Green v. Pledger*.‡

In *Whitaker v. Thurston*,§ a summons was served personally on a defendant who had not appeared. Jessel, M.R., held that it was unnecessary to file it, also, with the Clerk of Records and Writs under Order XIX., Rule 6.

Rule 8.

The plaintiff may, by leave of the Court or a Judge to be obtained *ex parte*, serve any notice of motion upon any defendant along with the writ of summons, or at any time after service of the writ of summons, and before the time limited for the appearance of such defendant.

This is analogous to the previous Chancery practice. For "writ of summons" must, however, be read "copy of the Bill." See the note to Order II., Rule 1, *supra*.

"By leave."—Where a defendant in Equity had not appeared to the Bill, though duly served, and *the time limited* for doing so *had not expired*, leave to serve the notice upon him must first have been obtained.||

The words "has expired" must be understood to be added at the end of this Rule, in order to make sense.

* *De Bauwen Iron Company*, 17 Jur., 127.

† *Re Smith*, 23 Beav., 284. But see *Wedderburne v. Llewellyn*, 18 W. R., 939.

‡ 3 Hare, 165.

§ W. N., 1876, p. 232.

|| Daniel's Chancery Practice, pp. 1442-3

Order LIV.,
Rule 1.

ORDER LIV.

APPLICATIONS AT CHAMBERS.

Rule 1.

Every application at chambers authorised by these Rules shall be made in a summary way by summons.

See as to the Judges' chambers, ss. 39, 40, 50, 63, and 79, of the Principal Act; s. 17, subs. (1) of this Act; Order XXXV., Rule 4; Order LXI., Rules 2, 4, and 4b; Rule 9 of the Rules of the Supreme Court, February, 1876, &c. See also Coe on the Practice of the Judges' Chambers.*

Both at Common Law † and in Chancery ‡ the mode of proceeding at Judges' Chambers has hitherto been by summons.

The summons should express in full the terms of the Order sought. There were, and are, however, many instances in which an Order will be made at chambers, *ex parte*, on affidavit, without notice, especially in cases of emergency.§

By Order VI. of the Rules of the Supreme Court (Costs), a Solicitor is only entitled to charge for attendance on a summons at Judges' chambers a maximum fee of *one guinea*. There are, however, special allowances according to circumstances. Where, from the length of the attendance, or from the difficulty of the case, the Judge thinks the sum of one guinea an insufficient remuneration for the services performed, or where the preparation of the case, or matter, to lay it before the Judge or Master at chambers, has required skill and labour for which no fee has been allowed, the Judge or Master may, in his discretion, allow a maximum fee of *two guineas*, or where the higher scale is applicable, of *three guineas*, or in proceedings to wind up a Company, of *five guineas*. Where, again, the preparation of the case, or matter, to lay it before the Judge at chambers, has required and received from the solicitor such extraordinary skill and labour, as materially to conduce to the satisfactory and speedy disposal of the business, and therefore appears to the Judge to deserve a still higher remuneration, *the Judge* may allow the solicitor by a memorandum in writing expressly made for that purpose, and signed by the Judge, specifying distinctly the grounds of such allowance, a maximum fee of *ten guineas*, instead of the above fees of two guineas, three guineas, or five guineas, respectively.||

The Judge may order such an amount of costs as he thinks reasonable to be paid to the party attending a summons at chambers by the party not attending, or not being prepared with any proper evidence, account, or other proceeding, where by reason of such non-attendance or

* London: Henry Sweet; 3, Chancery Lane, 1876.

† Lush's Practice, p. 950. There were, however, several cases in which orders might be obtained upon *ex parte* application without summons, and with or without an affidavit. See a list of them in Lush's Practice, p. 949.

‡ 15 & 16 Vict. c. 80, s. 28.

§ See *e.g.*, the cases cited in the note to subs. (8) of s. 25 of the Principal Act, *supra*, as to receivers and injunctions, *ex parte*.

|| Rules of the Supreme Court (Costs), Schedule and Special Allowances, sec. 10.

neglect, the summons is adjourned without any useful progress being made.* Order LIV.,
Rule 1.

No costs of Counsel attending at Judge's chambers will in any case be allowed, unless the Judge certifies it to be a proper case for Counsel to attend.†

If any party appears upon any application or proceeding at chambers, in which he is not interested, or upon which, according to the practice of the Court he ought not to attend, he is not to be allowed any costs of such appearance, unless the Court or a Judge shall expressly direct such costs to be allowed.‡

The Solicitor issuing the summons must attend punctually at the hour named, and *wait half an hour* for his opponent; if the latter fails to appear he should make an affidavit of service and attendance, and apply *ex parte*.

Rule 2.

In the Queen's Bench, Common Pleas, and Exchequer Divisions a Master, and in the Probate, Divorce, and Admiralty Division a Registrar, may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Act, or the Schedule thereto, or these Rules, may be transacted or exercised by a Judge at chambers, except in respect of the following proceedings and matters; that is to say,—

All matters relating to criminal proceedings or to the liberty of the subject :§

The removal of actions from one Division or Judge to another Division or Judge :||

The settlement of issues, except by consent :¶

Discovery, whether of documents or otherwise, and inspection, except by consent :**

* Rules of the Supreme Court (Costs), Special Allowances and General Provisions, § 11, *infra*.

† Rules of the Supreme Court (Costs), Special Allowances and General Provisions, § 14, *infra*.

‡ Rules of the Supreme Court (Costs), Special Allowances and General Provisions, § 21. See, further, as to disallowance of costs at chambers, *Ibid.*, § 18, § 19, § 20, *infra*.

§ See section 34 of the Principal Act, *supra*, and Order LXII., *infra*.

|| See section 36 of the Principal Act, section 11 of this Act, and Order LI., *supra*.

¶ See Order XXVI., *supra*.

** See Order XXXI., *supra*.

**Order LIV.,
Rule 2.**

Appeals from District Registrars :*

Interpleader, other than such matters arising in interpleader as relate to practice only, except by consent :†

Prohibitions :

Injunctions and other orders under subsection (8) of section 25 of the Act, or under Order LII., Rules 1, 2 and 3, respectively :

Awarding of costs, other than the costs of any proceeding before such Master :‡

Reviewing taxation of costs :§

Charging orders on stock, funds, annuities, or share of dividends or annual produce thereof :||

Acknowledgments of married women.

This Rule is taken from the Reg. Gen. Mich. T., 1867, with some variations. It applies to the District Registrars, Order XXXV., Rule 4.

The exceptions mentioned in Reg. Gen. Mich. T., 1867, include several (*italicised*) which are omitted in this Rule:—"All matters relating to criminal proceedings; *the removal of causes from Inferior Courts* other than the removal of judgments for the purpose of having execution; prohibitions and injunctions; *the referring of causes under the Common Law Procedure Act, 1854; the rectifying of omissions or mistakes in the register under the Joint Stock Companies Acts;* interpleader, other than such matters arising in interpleader as relate to practice only; discovery, whether by inspection of documents, interrogatories, or otherwise; reviewing taxation of costs; *staying proceedings after verdict;* acknowledgments of married women; *leave to sue in forma pauperis;* orders for charging stock, funds, annuities, shares or dividends, or annual produce thereof." "Matters relating to the liberty of the subject" were also excepted.¶

It will also be observed that there are several things which Masters may now do *by consent*, which were formerly entirely excepted.

As to powers of District Registrars, see Order XXXV., Rules 4 and 5, *supra*.

* See Order XXXV., Rule 7, *supra*.

† See Order I., Rule 2, *supra*.

‡ See Order LV., *supra*, etc.

§ See the Rules of the Supreme Court (Costs), General Provisions, § 32, § 33, *infra*.

|| See Order XLVI., *supra*.

¶ The Reg. Gen., Mich. T., 1867, were made under the authority of the Judges' Chambers (Despatch of Business) Act (30 and 31 Vict. c. 68).

Rule 2a.

Order LIV.,
Rule 2a.

The authority and jurisdiction of the District Registrar or of a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions shall not extend to granting leave for service out of the jurisdiction of a writ of summons or of notice of a writ of summons.

This new Rule was added by Rule 19 of the Rules of the Supreme Court, June, 1876.

See, as to granting leave for service of a writ of summons or of notice of it out of the jurisdiction, Order II., Rules 4 and 5, and Order XI., *supra*; also sections 18 and 19 of the Common Law Procedure Act, 1852. Some very nice questions may arise under Order XI., hence the restricting by this Rule of granting leave to the Judge.

Rule 3.

If any matter appears to the Master proper for the decision of a Judge the Master may refer the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the Master with such directions as he may think fit.

This Rule is copied from the Reg. Gen. Mich. T., 1867. See also Order XXXV., Rule 6, *supra*, as to District Registrars.

Rule 4.

Any person affected by any order or decision of a Master, may appeal therefrom to a Judge at chambers. Such appeal shall be by summons, within four days after the decision complained of, or such further time as may be allowed by a Judge or Master.

The first clause of this Rule is taken from "The Judges' Chambers Despatch of Business Act, 1867" (30 and 31 Vict. c. 68), section 4. The second clause of the Rule is copied from the Reg. Gen. Mich. T., 1867.

See also Order XXXV., Rule 7, *supra*, as to District Registrars.

The useful character of the present Rule may be illustrated by an example:—

On appeal to Lush, J., at chambers, from the decision of a Master, allowing, in an action for goods sold, to which the defendant had pleaded "never indebted" and "*coverture*," an equitable replication that the defendant had, in her own proper person, promised to pay, and thereby charged her separate estate, his lordship reversed the Master's decision, on the ground that the replication did not state that the defendant *had* any separate estate, and was, therefore, bad from any point of view.*

* *Hancock v. De Nicville*, 1 Charley's Cases (Chambers), 128.

**Order LIV.,
Rule 4.**

The application is usually determined by the Judge upon the same materials as those used before the Master; but as an appeal from a Master to a Judge (like an appeal to the Court of Appeal), is a re-hearing, fresh facts may be gone into * and fresh affidavits may be used.†

Archibald, J., decided, at chambers, that the new practice on appeals to the Court of Appeal, which gives the successful party his costs of appeal, applies to appeals from the Master to the Judge.‡

Rule 5.

An appeal from a Master's decision shall be no stay of proceeding unless so ordered by a Judge or Master.

This Rule is copied from the Reg. Gen., Mich. T., 1867.

See also Order XXXV., Rule 8, *supra*, as to District Registrars; and compare Order LVIII., Rule 16, *infra*.

Rule 6.

In the Queen's Bench, Common Pleas, and Exchequer Division [s], every appeal to the Court from any decision at chambers shall be by motion, and shall be made within eight days after the decision appealed against.

See, as to the subject-matter of this Rule, sections 49 and 50 of the Principal Act, and the notes thereto, *supra*.

The Rule is in accordance with the previous Common Law Practice, except that the *time* within which the motion is to be made has not hitherto been defined; but the motion must have been made "within a *reasonable time*."§

Nothing is said in this Rule about the necessity of moving on *affidavits*. Under the old practice the application was made on an affidavit verifying a copy of the Judge's order.|| The same affidavits, also, upon which the order was founded, might have been used on the application to set it aside.¶ The application might also, as a general rule, have been strengthened by additional affidavits.** If the affidavits which were used at chambers were intended to be used upon the motion, notice was given to the Judge's Clerk to produce them, and he thereupon handed them to the officer acting as Clerk of the Rules; but if he had already returned them to the Rule Officer, notice was given to the Clerk of the Rules to have them in Court.††

* 1 Charley's Cases (Chambers), 128. Per Lush, J. See Order LVIII., Rule 2.

† *Ib.*, 129. Per Quain, J. "This ruling has been held by other Judges and confirmed by the Court." Coe's Practice of the Judges' Chambers, 6.

‡ *Bartlett v. Roche*, 2 Charley's Cases (Chambers), 34; *Lord Hanmer v. Flight*, *ib.*, 23.

§ *Chapman v. King*, 4 D. and L., 311; *Meredith v. Gittans*, 19 L. T. (Q. B.), 59, E. T., 1852.

|| *Hoby v. Pritchard*, 5 Dowl., 300.

¶ *Pickford v. Ewington*, 4 Dowl., 453.

** *Peterson v. Davis*, 6 C. B., 235.

†† See *Needham v. Bristow*, 4 Sc., N. R., 733; 1 Dowl., N. S., 700; 4 M. and G., 262. (The practice will probably be the same under this Act.)

It is not a sufficient compliance with this Rule to *give notice of motion* within the eight days. The *motion itself* must be made within the eight days.*

Order LIV.,
Rule 6.

This Rule is PEREMPTORY.† No appeal lies after the expiration of the eight days, unless the Court or a Judge, under the powers conferred upon them by Order LVII., Rule 6, *enlarge the time* for appealing, on application made to them for that purpose.‡

The case in which this was decided was a peculiarly hard one, as the Judge's Order was made by Huddleston, B., during the Long Vacation, and the only Divisional Court then sitting was that composed of the two Vacation Judges,§ of whom Huddleston, B., was one. The motion was made on November 4th, the third day of the next following sittings, and it was held by the Divisional Court of the Common Pleas Division that it was too late. The Court, indeed, offered to enlarge the time, under Order LVII., Rule 6. The appellant, however, declined the offer, as it was accompanied by unpalatable "terms."

On the eighth day after the decision of a Judge at chambers, there being no chance of a motion of appeal from it being reached, the Common Pleas Division allowed the appellant, on filing an affidavit and giving notice, to treat the motion as having been made and adjourned. This "indulgence" was conceded on November 8th, 1875, the Supreme Court of Judicature Acts having come in force just eight days before, and the Court said that the "indulgence" was "not to be taken as a precedent."||

A motion of appeal from the decision of a Judge at chambers is in time if it be made on the ninth day after the decision, if the eighth day is a Sunday.¶

ORDER LV.

COSTS.

Rule 1.

Subject to the provisions of the Act,** the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any

* *Fox v. Wallis*, 2 C. P. D., 45; 35 L. T., 690; 25 W. R., 287; 11 N. C., 206.

† *Crom v. Samuels*, 2 C. P. D., 21; 46 L. J. (C. P.), 1; 35 L. T., 423; 25 W. R., 45. See, also, *Deykin v. Coleman*, 36 L. T., 195; 25 W. R., 294; and *Fox v. Wallis*, *ubi supra*.

‡ The application may be made *after* the eight days have expired. Per Denman, J., in *Crom v. Samuels*, *ubi supra*.

§ Under section 28 of the Principal Act, and Order LXI., Rules 6 and 7.

|| *Sickles v. Morris*, *Times*, November 9th, 1875; 1 Charley's Cases (Court), 159.

¶ *Taylor v. Jones*, 1 C. P. D., 87; 45 L. J. (C. P.), 110; 34 L. T., 141; 1 Charley's Cases (Court), 160. See Order LVII., Rule 3, *infra*.

** These words govern the proviso at the end of the section, *Parsons v. Tinsling*, 2 C. P. D., 119, 121; 35 L. T., 851; 25 W. R., 255; 46 L. J. (C. P.), 230.

**Order LV.,
Rule 1.**

right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity :* Provided, that where any action or issue is tried by a Jury,† the costs shall follow the event, unless, upon application made at the trial, for good cause shown the Judge before whom such action or issue is tried or the Court shall otherwise order.

See, as to costs, taxation of costs, and review of taxation, the Rules of the Supreme Court (Costs), Order VI., *infra*.

See, also, as to costs in particular cases, Order II., Rule 2; Order III., Rule 7; Order XIII., Rules 3 and 5; Order XIV., Rule 1; Order XVII., Rule 9; Order XXII., Rule 10;‡ Order XXIII., Rule 1;§ Order XXVII., Rules 4 and 6; Order XXVIII., Rules 7, 8, and 11; Order XXIX., Rules 1, 2, and 14; Order XXX., Rule 4; Order XLV., Rule 10, etc.

This Rule is a re-enactment of Rule 47 of the Principal Act, except the proviso at the end, which was added in Committee on the Bill.

The Judicature Commission in their First Report|| recommended "that in all the Divisions of the Supreme Court the costs of the suit and of all proceedings in it should be in the discretion of the Court."

Upon this subject Mr. Daniel¶ has the following pertinent explanatory remarks:—"The giving of costs in Equity is entirely discretionary. It must not be supposed, however, that the Court is not governed by definite principles in its decisions relative to the costs of proceedings before it. All that is meant by the *dictum* is, that the Court is not, like the Common Law Court, held inflexibly to the Rule of giving the costs of suit to the successful party, but that it will, in dividing costs, take into consideration the circumstances of the particular case before it and the situation and conduct of the parties, and exercise its discretion with reference to those points. It does not, as is frequently supposed, act upon the mere caprice of the Judge before whom the cause happens to be tried."

The Common Lawyers in the House of Commons were, however, alarmed at the alteration in the fundamental law of trial by jury, which the original Rule, standing out in its naked simplicity, would have involved. The whole policy of the Legislature from the Statute of Gloucester down to the 38th of the Queen, in reference to costs in trials by jury was about to be sacrificed; accordingly, Mr. Morgan Lloyd, Q.C., Mr. [now Mr. Justice] Lopes, Q.C., and Mr. Grantham, gave notice of their intention to move the omission of the original Rule; and Sir Henry James, Q.C., took the milder course of giving notice of his intention to move to add the proviso which now forms part of the Rule.

* See as to this, *In Re Hoskin's Trusts*, 25 W. R., 779.

† "This clearly includes cases in which a counterclaim is set up in the action." Per Cleasby, B., in *Staples v. Young*, 2 Ex. D., 324.

‡ See *Staples v. Young*, *ubi supra*.

§ See *The "St. Olaf"*, 2 P. D., 113.

¶ P. 15.

|| Chapter xxxi. of his "Chancery Practice," "Costs," p. 1238.

In Committee on the Bill the then Attorney-General refused to give way, but at the last moment, on the report, he silently assented to Sir Henry's proviso, and it was added to the Rule. As Sir Henry James originally drafted his amendment, it made the principle that "costs shall follow the event" applicable to the trial of "*any* action or issue" by a jury. On the report, however, he altered his amendment, so as to make it applicable only to "*any* action or issue tried by a jury in the *Queen's Bench, Common Pleas, or Exchequer Division of the High Court.*" The House of Lords did not like the amendment in this form, considering, no doubt, that the symmetry of the Bill would be spoilt if in trial by jury in three of the Divisions of the High Court the costs were to follow the event, and in trials by jury in the other two Divisions, the costs were to be in the discretion of the Court; so their Lordships, when considering the Commons amendments, altered Sir Henry James's proviso back to its original form, and in that shape it became law.

See, as to the costs of an action tried by jury following the event in the case of the plaintiff, 6 Edw. I. c. 1; in the case of the defendant, 23 Hen. VIII. c. 15, 4 Jac. I. c. 3, and 3 and 4 Wm. IV. c. 42, s. 32; as to the costs of issues in trials by jury following the event, see the Common Law Procedure Act, 1852, s. 81, and Reg. Gen. Hil. T., 1853, Rule 62.

"Subject to the provisions of the Act," i.e., the 67th section of the Principal Act, which makes the 5th, 7th, 8th and 10th sections of the County Courts Act, 1867 (30 and 31 Vict. c. 142), applicable to "all actions commenced or pending in the High Court, in which any relief is sought which can be given in a County Court."* The enactments referred to in s. 67 of the Principal Act are set out at full length in the note to that section, *supra*. The editors of the 13th edition of Roscoe's *Nisi Prius* refer to the words, "Subject to the provisions of the Act," and say that "the provision herein referred to is s. 67. (See also 3 & 4 Vict. c. 24, s. 2.)

"But nothing herein contained," &c. Trustees, agents, and receivers, whether plaintiffs or defendants, accounting fairly, and paying their money into Court, are entitled to their costs out of the estate which is the subject of the suit in Chancery, as a matter of course,† and the same rule extends to personal representatives.‡ The Rule must be understood as applying strictly between themselves and their *cestuis que trustent*. In suits between them and those who are strangers to their trust, the ordinary rules as to costs prevail.§ If the conduct of the party holding a fiduciary character is obviously vexatious, he will not be allowed his costs out of the estate,|| and if he is guilty of misconduct in the course of the suit, the Court will compel him to pay the costs of the suit out of his own pocket.¶

Where the owner of an estate proceeds to deliver it from a mortgage or other incumbrance which he himself or those under whom he claims have put upon it, the mortgagee or incumbrancer will be allowed, as against

* *Parsons v. Tinling*, 2 C. P. D., 119; 46 L. J. (C. P.), 280; 35 L. T., 857; 25 W. R., 255.

† *Attorney-General v. City of London*, 1 Ves. Jun., 243, 246.

‡ *Rashley v. Masters*, 1 Ves. Jun., 205.

§ Lewin on Trusts, 732.

|| *Cutreis v. Chandler*, 6 Madd., 123.

¶ *Sheppard v. Smith*, 2 Bro. P. C., 375.

**Order LV.,
Rule 1.**

the estate,* his costs, including all costs which he may have incurred in defending or asserting his title to it.† A mortgagee or other incumbrancer is, however, liable to forfeit his claim for costs by misconduct with reference to the suit, or the subject of it.‡

In *Parsons v. Tinling*,§ the Common Pleas Division held that the plaintiff in an action for libel, who obtained a farthing damages, was entitled to his costs, which "follow the event" in jury trials. The case did not fall under s. 5 of the County Courts Act, 1867, as that section only applies now to actions in the High Court, "in which relief is sought which can be given in a County Court," and the relief sought could not be given in a County Court in this case, as it was an action for libel.¶

The decision in *Parsons v. Tinling* was followed in *Bowey v. Bell*,¶ which was a case on all fours with *Parsons v. Tinling*, except that the action was one of slander instead of libel, and the decision was that of the Queen's Bench instead of the Common Pleas Division.

The decision in *Parsons v. Tinling* was also followed by the Common Pleas Division in *Garnet v. Bradley*,** which was also an action for slander, but the majority of the Court of Appeal†† reversed the decision in *Garnett v. Bradley*, on appeal, overruling, it would seem, *Parsons v. Tinling*. It is understood that an appeal, however, is pending to the House of Lords.

Where a lady of fashion consented to pay her dressmaker's bill, but refused to pay the costs of an action for the amount of the bill brought by him, and the action was consequently tried, and a verdict given against her, the Judge (Huddleston, B.), at *Nisi Prius*, directed that the costs should follow the event.‡‡

Where the defendant succeeds on the ground of compulsory pilotage only, he will not be deprived of his costs in the *Common Law Divisions*,§§ *secus*, in the Admiralty Division.¶¶

Where an action has been tried, and the Judge has directed a non-suit, and a new trial has been ordered on the ground of misdirection, and at the second trial a verdict has been given for the plaintiff, the "event" mentioned in the present Rule, is the verdict given at the second trial, and the plaintiff is entitled to the costs of *both* trials. This was so decided by the Court of Appeal in *Green v. Wright*.¶¶¶

"Unless, upon application made at the trial, the Judge before whom the action is tried, or the Court, shall otherwise order." The leading

* *Detillin v. Gale*, 7 Ves., 583.

† *Hunt v. Fownes*, 9 Ves., 70.

‡ *Francklyn v. Fern*, Barnard, 30.

§ 2 C. P. D., 119; 35 L. T., 851; 25 W. R., 255; 46 L. J. (C. P.), 230. ¶ County Courts Act, 1846 (9 and 10 Vict. c. 95, s. 58).

¶ 36 L. T., 550.

** 36 L. T., 725; 25 W. R., 653; W. N., 1877, p. 136; 12 N. C., 118. (Kelly, C.B., *dissentiente*.)

†† Bramwell and Brett, L.JJ.

‡‡ *James v. Norton*, *Times*, November 18th, 1875; 1 Charley's Cases (Court), 161.

§§ *The General Steam Navigation Co. v. The London and Edinburgh Shipping Co.*, 25 W. R., 694; 36 L. T., 743.

¶¶ *The "Daoiz"*, W. N., 1877, p. 93.

¶¶¶ 46 L. J. (C. P.), 427; 36 L. T., 355; 25 W. R., 501; W. N., 1877, p. 78.

case on the meaning of this exception is *Baker v. Oakes*,* in which it was established that a Judge *at chambers* has no power to make an order as to costs under the exception, even although he is the same Judge who tried the action. The application must be made to the Judge who tries the action *at the trial*, or else to the Divisional Court, subsequently. If the words had been simply, "unless the Court or a Judge shall otherwise order," any Judge at chambers would have had jurisdiction to make the order. "It was intended," said Brett, L.J., "that the application should be made either to the Judge before whom the cause was tried, *when his mind was full*, or, if it was made at any time after, the matter was advisedly referred to the Court, and advisedly kept from the Judge at chambers."

Order LV,
Rule 1.

Baker v. Oakes was cited with approval and followed in *The Tyne Alkali Company v. Lawson*.† The jury in that case, which was an action for negligence, tried before Lush, J., at Newcastle, found a verdict for the defendants, "believing both parties to be in fault," and the Associate immediately entered this verdict in his book. No application with respect to costs was then made, and the costs, therefore, "followed the event." The cause was the last for trial at Newcastle, and, at the close of it, the Judge left Newcastle for York. Four days after, the Counsel for the plaintiffs applied to Lush, J., in the Crown Court at York, to direct the Associate to enter judgment in the *Tyne Alkali Company v. Lawson* for the defendants *without costs*, on the ground that as the jury had, in effect, found that there was negligence on both sides, each party ought to bear his own costs. Lush, J., after consideration, acceded to the application, and made an order on which judgment was entered by the Associate for the defendants, without costs. The Divisional Court of the Exchequer Division set aside the order of Lush, J., and made absolute the defendant's rule to enter judgment for the defendants with costs. The ground of the decision was that Lush, J., did not make the order "*at the trial*," within the meaning of the exception at the end of the present Rule.

The costs of an attachment are no longer a fixed sum, but are in the discretion of the Court, and should be applied for at the time of the writ.‡

The Court of Appeal cannot vary a Chancery decree as to costs alone; s. 49 is imperative.§

This Rule has no application to the costs of a reference to a Master on a matter of account, which is silent as to costs.||

Section 9 of "The County Courts Jurisdiction Act, 1868," is repealed by this Rule.¶

Rule 2.

In any cause or matter, in which security for costs is required, the security shall be of such amount, and be given at such time or times, and in such manner and form, as the Court or a Judge shall direct.

* 2 Q. B. D., 171; 46 L. J. (Q. B.), 246; 25 W. R., 220; 35 L. T., 832.

† 36 L. T., 100; W. N., 1876, p. 6; 12 N. C., 27.

‡ *Abud v. Riches*, 2 Ch. D., 528. § *Harris v. Aaron*, 46 L. J. (Ch.), 488.

|| *Wimshurst, Hollick and Co. v. The Barrow Ship Building Co.*, 2 Q. B. D., 335; 46 L. J. (Q. B.), 447.

¶ W. N., 1877, p. 126.

**Order LV.,
Rule 5.**

This new Rule was added by the Rules of the Supreme Court, February, 1876.

"In which security for costs is *required*." A shareholder of a company who resides out of the jurisdiction, and appears to oppose a petition for winding up the company, cannot be required to give security for costs.* "The principle," said Jessel, M.R., in the case in which this was decided, "is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be effectually made against him, if unsuccessful, is by the Rules of the Court compelled to give security for costs. That is a perfectly well-established and a perfectly reasonable principle, but it does not apply to a defendant or respondent who is brought here to defend himself."

By Rule 6 of the 40th Consolidated Order of the Court of Chancery it was provided that the penal sum in the bond to be given as security for costs in a Chancery suit by a plaintiff who was out of the jurisdiction of the Court, was to be £100. Instead of giving the bond, the plaintiff might deposit the sum of £120 in Court, the £20 being intended to cover the costs of paying the money into and out of Court. Under s. 69 of the Companies Act, 1862, however, it was provided that the plaintiff might be required to give *sufficient* security for costs.

At Common Law substantial security for costs, according to the nature of the case, was insisted upon.

In *The Republic of Costa Rica v. Erlanger*,† brought in the Court of Chancery before the 1st of November, 1875, the plaintiffs, a foreign government, elected to pay £120 into Court, as security for costs. It appeared from the affidavit of the solicitors of two of the defendants, that, on the 20th of March, 1876, the costs already incurred by these defendants amounted to £1,000, and that their costs, up to and including the hearing, would probably amount to £2,000. The Court of Appeal, reversing the decision of Malins, V.C., who had refused an application, on the part of the two defendants already mentioned, for further security, ordered further security, to the extent of £500, to be given by the plaintiffs for *future* costs, leave being given to the two defendants to apply again, if necessary. Further security, it was said, could not be required for *past* costs.

In *Paxton v. Bell*,‡ which was decided subsequently to the decision of Malins, V.C., but prior to the decision of the Court of Appeal in *The Republic of Costa Rica v. Erlanger*, Bacon, V.C., decided that the old Chancery Rule as to security for costs must prevail in the Chancery Division, unless some special reason could be shewn for increasing the amount. The Court of Appeal refused to interfere with the Vice-Chancellor's discretion.§

This Rule applies only to giving security for costs in the High Court of Justice; the provision as to giving security for the costs of an appeal to the Court of Appeal, and the cases thereon, will be found in Rule 5 of Order LVIII., *infra*.

* *In Re Percy & Kelly Nickel, Cobalt and Chrome Iron Mining Company*, 2 Ch. D., 531.

† 3 Ch. D., 62; 35 L. T., 19; 24 W. R., 955.

‡ 24 W. R., 1013.

§ W. N., 1876, p. 249.

ORDER LVI.

NOTICES AND PAPER, ETC.

Order LVI.,
Rule 1.

Rule 1.

All notices required by these Rules shall be in writing, unless expressly authorised by a Court or Judge to be given orally.

By the Reg. Gen., Hil. T., 1853, Rule 161, *all notices* required by those Rules or by the practice of the Common Law Courts are to be *in writing*. The present Rule adopts this Rule, engrafting upon it, however, the important exception, "unless expressly authorized by the Court or a Judge to be given *orally*."

By the Rules of the Supreme Court (Costs), Order V., the party requiring any copy of any deposition, affidavit, proceeding, or document, filed or prepared by or on behalf of another party, which is *not required to be printed*, or the solicitor of such party, is to make a written application to the party by whom the copy is to be furnished, or his solicitor, with an undertaking to pay the proper charges; and thereupon such copy is to be made and ready to be delivered at the expiration of TWENTY-FOUR HOURS after the receipt of such request and undertaking, or within such other time as the Court or Judge may in any case direct, and is to be furnished accordingly upon demand and payment of the proper charges.* Such written copies shall be written in a neat and legible manner on the same paper as that mentioned in Rule 2 of this Order.† In case any party or solicitor who shall be required to furnish any such written copy as aforesaid shall either refuse or, for twenty-four hours from the time when the application for such copy has been made, neglect to furnish the same, the person by whom such application shall be made shall be at liberty to procure an office copy from the office in which the original shall have been filed, and in such case no costs shall be due or payable to the solicitor so making default in respect of the copy or copies so applied for.‡

By Order II. of the Rules of the Supreme Court (Costs), the Rules of Court as to printing depositions and affidavits to be used on a trial shall not apply to depositions and affidavits which have previously been used upon any proceeding without having been printed.§

Rule 2.

Proceedings required to be printed shall be printed on cream-wove machine drawing foolscap folio paper, 19 lbs. per mill ream, or thereabouts, in pica type leaded, with an inner margin about three-quarters of an inch wide, and an outer margin about two inches and a half wide.

See Order V. of the Rules of the Supreme Court (Costs).

* Copied from Chancery Order XXXVI., Rules 4 and 6, "24" being substituted for "48" hours.

† Taken from the Chancery Order XXXVI., Rules 8 and 11.

‡ Copied from the Chancery Order XXXVI., Rule 12.

§ See Order XXXVIII., Rule 6, *supra*.

**Order LVI.,
Rule 2.**

This Rule, which effects a considerable change in the practice at Common Law, is copied *verbatim* from Order IX., Rule 3, of the Consolidated Orders of the Court of Chancery.

"Proceedings required to be printed." Writs of summons are, by Order V., Rule 5, *supra*, directed to be printed "on paper of the same description as hereby directed in the case of proceedings directed to be printed."

Prior to the 15 & 16 Vict. c. 86, the practice was to engross Bills of Complaint in Chancery on *parchment*. That enactment expressly provided that this practice should be "discontinued." Thenceforth Bills were printed. At Common Law the practice has hitherto been to engross the declaration,* and pleas on "plain paper,"† but to engross the writ of summons, on the other hand, on *parchment*,‡ which has the great advantage of being a durable substance, not liable to be torn or destroyed while undergoing frequent manipulations.§

By Order I. of the Rules of the Supreme Court (Costs), where any written deposition of a witness has been filed for use on a trial, such deposition shall be printed, unless otherwise ordered.||

By Order III. of the Rules of the Supreme Court (Costs), other affidavits than those required to be printed by Order XXXVIII., Rule 6, may be printed if all the parties interested consent thereto, or the Court or Judge so order.¶

By Order V. of the Rules of the Supreme Court (Costs), where, pursuant to Rules of Court, any pleading, special case, petition of right,** deposition, or affidavit is to be printed, and where any printed or other office copy thereof is to be taken, the following regulations shall be observed: The party on whose behalf the deposition or affidavit is taken and filed is to print the same in the manner provided by the present Rule.†† To enable the party printing, to print any deposition, the officer with whom it is filed shall on demand deliver to such party a copy written on draft paper on one side only. The party printing shall, on demand in writing, furnish to any other party or his solicitor any number of printed copies, not exceeding ten, upon payment therefor at the rate of ONE PENNY PER FOLIO for one copy, and ONE HALFPENNY PER FOLIO for every other copy. The solicitor of the party printing shall give credit (i.e., to the party printing), for the whole amount payable by any other party for printed copies. The party entitled to be furnished with a print shall not

* It was no objection that it was partly written and partly printed; *Brand v. Rich*, 2 Moore, 654.

† Archbold's Practice, 232, 289.

‡ *Ib.*, 198.

§ FORMS of Writs of Summons and of other printed proceedings under these Acts, settled by the writer, can be obtained of Messieurs WATERLOW AND SONS LIMITED, 66, London Wall, City; 26, Great Winchester Street, City; and 49, Parliament Street, Westminster. (See advertisement on front page.)

|| See Order XXXVII., Rule 4, *supra*, and Order in Chancery of 16th May, 1862, Rule 4.

¶ This was originally Rule 6 of Order LVI., but was struck out there in Committee in the House of Commons.

** See the Petition of Right Act, 1860 (23 & 24 Vict. c. 34), and Chancery Order of 1st February, 1862.

†† See Order IX., Rule 3, of the Chancery Orders.

be allowed any charge in respect of a written copy, unless the Court or Judge shall otherwise direct.* The party by or on whose behalf any deposition, affidavit, or certificate is filed, shall leave a copy with the officer with whom the same is filed, who shall examine it with the original and mark it as an office copy; such copy shall be a copy printed as above provided where such deposition or affidavit is to be printed.†

Order LVI.
Rule 2.

By the same Order, where by any order of the Court (whether of Appeal or otherwise), or a Judge, any pleading, evidence, or other document is ordered to be printed, the Court or Judge may order the expense of printing to be borne and allowed, and printed copies to be furnished by and to such parties and upon such terms as shall be thought fit.

The following additional provisions, contained in the same Order, may here be noted: It shall be stated, in a note at the foot of every affidavit filed, on whose behalf it is so filed, and such note shall be printed on every printed copy of an affidavit or set of affidavits, and copied on every office copy and copy furnished to a party.‡ The name and address of the party or solicitor by whom any copy is furnished is to be endorsed thereon in like manner as upon proceedings in Court, and such party or solicitor is to be answerable for the same being a true copy of the original, or of an office copy of the original, of which it purports to be a copy, as the case may be.§ The folios of all printed and written office copies, and copies delivered or furnished to a party, shall be numbered consecutively in the margin thereof.

Rule 3.

Any affidavit may be sworn to either in print or in manuscript, or partly in print and partly in manuscript.

No fewer than 7 Rules of this Order (of which there were originally 10), were struck out in Committee on the Bill in the House of Commons.||

The substituted provisions will be found in the Rules of the Supreme Court (Costs), already cited under Rules 1 and 2 of this Order, *supra*.

ORDER LVII.

TIME.

Rule 1.

Where by these Rules, or by any judgment or order given or made after the commencement of the Act, time for doing any act or taking any proceeding is limited by

* Taken from Chancery Order XL., Rule 8, and Order of March 6, 1860, Rule 13.

† Taken from Chancery Orders of March 6, 1860, Rules 2 and 3, and 16th May, 1864, Rule 3, and Order XXXVI., Rule 2.

‡ Partly taken from Chancery Order of 5 Feb., 1861.

§ Copied from the Chancery Order XXXVI., Rule 8.

|| Particular objection was taken by the Incorporated Law Society to Rule 8. "Any party requiring a copy of any affidavit, filed by any other party, shall take an office copy."

Order LVII., months, not expressed to be lunar months, such time
Rule 1. shall be computed by calendar months.

By Order XXXVII., Rule 10, of the Consolidated Orders of the Court of Chancery, "where the time for doing any act or taking any proceeding is limited by months, not expressed to be calendar months, such time shall be computed by *lunar* months of 28 days each." This, it will be perceived, is the exact converse of the present Rule, so that the system of computing months in Chancery is entirely changed. The change is not confined, however, to Chancery practice, for in legal proceedings generally a month is 28 days, or four weeks. *Tullet v. Linfield*; * *Soper v. Curtis*.†

The present Rule follows the 13 & 14 Vict., c. 21, s. 4, by which it is declared that "in all Acts of Parliament the word 'month' is to be taken to mean *calendar* month, unless words be added showing that lunar month is intended."

Rule 2.

Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time.

This Rule is copied *verbatim* from Order XXXVII., Rule 11 of the Consolidated Orders of the Court of Chancery.

Sundays are not to be excluded from the computation of time, unless the limited time is less than six days. Therefore, where an appeal from the decision of the Chief Judge in Bankruptcy was entered twenty-three days, counting Sundays, and notice of appeal was served twenty-nine days, counting Sundays, after the order appealed from was made, the Court of Appeal held that it was too late.‡

It may here be mentioned that where any particular number of days, not expressed to be "clear days," is specified, the last day is excluded, but the first day is not.§ Where "clear days" || are specified, the first day and the last day are both excluded.¶

Rule 3.

Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or

* 3 Burr., 455; 1 W. BL., 450.

† 2 Dowl., 237.

‡ *Ex parte Viney, In re Gilbert*, 4 Ch. D., 794; 46 L. J. (Bank.), 80; 36 L. T., 43.

§ Reg. Gen., Hil. T., 1853, Rule 176

|| See, *e.g.*, Order LIII., Rule 4.

¶ *Watson v. Eales*, 23 Beav., 300.

proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken, if done or taken on the day on which the offices shall next be open.

Order LVII.,
Rule 3.

This Rule is copied *verbatim* from Order XXXVII., Rule 12, of the Consolidated Orders of the Court of Chancery.

This Rule applies to motions in Court.

Where the last of the eight days limited by Order LIV., Rule 6, for appealing from a Judge at Common Law Chambers is a Sunday, the time for appealing is extended by this Rule to the next day—Monday.*

The date of the service of notice of appeal is now the material thing in a question of time, not the date of entering the appeal.†

This Rule only extends the time, when, by reason of the closing of the offices, any act or proceeding cannot be done or taken. The closing of the offices, for example, does not prevent *service of notice of appeal* from an order of the Chief Judge in Bankruptcy on the respondents. Therefore, where the twenty-one days ‡ for appealing from an order of the Chief Judge in Bankruptcy expired in the Easter vacation, while the offices were closed, and the appellant waited till after the offices had been re-opened, before serving notice of appeal on the respondent, or entering the appeal, the Court of Appeal held that the appeal was too late.§

A notice of motion for the 22nd || or 27th ¶ of December, being *dies non*, days on which, under the Rules of the Supreme Court, there are no sittings, is bad. If the party on whom the notice is served appears, he will not be entitled to his costs. The Court has no power to amend the notice of motion by enlarging or abridging the time named in it.

Rule 4.

No pleadings shall be amended or delivered in the Long Vacation, unless directed by Court or a Judge.

The Long Vacation commences on the 10th of August, and terminates on the 24th of October (Order LXI., Rule 2).

The 2 Wm. IV. c. 39, provided that no plea should be delivered between the 10th of August and the 24th of October. A plea delivered within this period was a nullity, and the plaintiff might, after the time for pleading had expired, sign judgment.**

* *Taylor v. Jones*, 1 C. P. D., 87; 45 L. J. (C. P.), 110; 34 L. T., 131; *Lewis v. Kent*, L. T., vol. lxiii., p. 61.

† By Rule 143 of the Bankruptcy Rules, 1870, the date of the entry was the material date.

‡ Under Order LVIII., Rules 2, 9, and 15.

§ *Ex parte Saffery, In Re Lambert*, 5 Ch. D., 365; 46 L. J. (Bank), 70; 36 L. T., 532; 25 W. R., 572; See also *Ex parte Vinoy, In Re Gilbert*, cited under Rule 2.

|| *Daubney v. Shuttleworth*, 1 Ex. D., 53; 45 L. J. (Ex.), 177; 34 L. T., 357; 24 W. R., 321.

¶ *Deykin v. Coleman*, 36 L. T., 195; 25 W. R., 294.

** The vesting a discretion in the Court or a Judge by the present Rule is a decided improvement.

**Order LVII.,
Rule 5.****Rule 5.**

The time of the Long Vacation shall not be reckoned in the computation of the times appointed or allowed by these Rules for filing, amending, or delivering any pleading, unless otherwise directed by a Court or a Judge.

This Rule is taken from Order XXXVII., Rule 13, of the Consolidated Orders of the Court of Chancery, the word "Long" being, however, inserted before "Vacation," so as to restrict the operation of the Rule.

"The times of filing, amending, or delivering any pleading." In all other cases "the time of the Long Vacation" counts; but the time can be enlarged under Rule 6 of this Order, *infra*, so as to obviate the inconvenience of this.*

Rule 6.

A COURT OR A JUDGE SHALL HAVE POWER TO ENLARGE OR ABRIDGE THE TIME APPOINTED by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed.

This Rule is taken from Order XXXVII., Rules 17 and 18, of the Consolidated Orders of the Court of Chancery, but it is more liberal than those Rules in its concluding proviso, as they require that a second application for an enlargement of time shall be made before the expiration of the time previously allowed.

Applications under this Rule should be to a Master by summons,† calling on the opposite party to show cause why the time for doing the act or taking the proceeding should not be, *e.g.*, enlarged.

In *Norris v. Beazley*,‡ the Court (Denman and Grove, JJ.) said: "Parties must not exercise the jurisdiction of the Court, and extend time *by mutual consent*. We do not accept such consent; but regard orders as to time as compulsory."

Subject to any special order, the costs of *one* application to extend the time limited by Rules of Court for taking any proceeding are, without special order, to be allowed as costs in the cause or matter; but (unless specially ordered) no costs of any *further* application are to be allowed to the party making such further application, as against any other party, or any estate or fund in which any other party is interested.§]

* *Crom v. Samuels*, 46 L. J. (C. P.), 1; 2 C. P. D., 21; 35 L. T., 423; 25 W. R., 45.

† See Coe's Practice of the Judges' Chambers, 35.

‡ 35 L. T., 845.

§ Rules of the Supreme Court (Costs), Special Allowances and General Provisions, § 22.

By Order VIII., Rule 1, an application for the renewal of a writ of summons must be made "before the expiration of the twelve months" from its date; Jessel, M.R., however, gave leave, under the power conferred upon him by the present Rule, to renew a writ of summons, although the twelve months from its date had expired.*

Order LVII.,
Rule 6.

In *Wilkins v. Bedford*,† Bacon, V.C., refused to extend the time for delivering a counterclaim, although it was only through the gross neglect of the defendant's solicitor that the counterclaim had not been delivered in time. The application was made, no doubt, six months after a decree had been pronounced against the defendant, but immediately on his discovering his solicitor's neglect.

The Rule which regulates the time of appealing from chambers is more peremptory than the Rule which regulates the time of applying for a new trial. The Court of Appeal in *Hallums v. Hills*,‡ decided that the motion for a new trial was in time if made under Order XXXIX., Rule 1, within the next four days after the trial on which the Court was *actually sitting*. In *Crom v. Samuels*,§ the Common Pleas Division decided that an appeal from the Judge at chambers was too late if made after the eight days mentioned in Order LIV., Rule 6, had elapsed, although the order appealed from was made in the Long Vacation, and it was impossible to appeal within the eight days as there was no Court then sitting to which the appeal could, with propriety, be made. The decision in *Crom v. Samuels* would involve much hardship if a remedy were not found for it under the present Rule. The enlargement of time may, however, be offered by the Court on *terms* which the appellant cannot accept.

A Judge at chambers has no power to make an order under this Rule enlarging the time for "the Judge, before whom the action" was "tried," to direct that the costs shall not follow the event under Order LV., Rule 1; and it makes no difference that the Judge at chambers is the Judge before whom the action was tried. The reason is, that the application to a Judge to order that the costs shall not follow the event must be made *at the trial*.||

Semble, that the Judge before whom the action is tried has power under the Rule, on application made to him *at the trial*, to direct that the time shall be enlarged for making the order that the costs shall not follow the event.¶

The time for appealing was enlarged by the Common Pleas Division to a week beyond the four days allowed by Order LVIII., Rule 4, on appeals from interlocutory orders.**

It is provided by Rule 5 of Order LVIII., that "the Court of Appeal shall have all the powers as to amendment, *and otherwise*, of the Court of First Instance." "We could, therefore," said Jessel, M.R., in giving

* *In Re Jones*; *Eyre v. Cox*, W. N., 1877, p. 38.

† 35 L. T., 622.

‡ 46 L. J. (C. P.), 88; 24 W. R., 956.

§ 46 L. J. (C. P.), 1; 2 C.P. D., 21; 35 L. T., 423; 25 W. R., 451.

|| *Baker v. Oakes*, 46 L. J. (Q. B.), 246; 2 Q. B. D., 171; 35 L. T., 832; 25 W. R., 220.

¶ *The Tyne Alkali Company v. Lawson*, 36 L. T., 100; 12 N. C., 27. Per Grove, J.

** *Sharrock v. The London and North-Western Railway Company*, *Times*, November 8th and 18th, 1875; 1 Charley's Cases (Court), 165, 167.

Order LVII., judgment in *Purnell v. The Great Western Railway Company*,* in the Court of Appeal, "enlarge the time, or do any other act that is necessary."
Rule 6.

In the case just cited the Court of Appeal ordered a new trial against a defendant, although no Rule had been moved for in the Court below and the time† had elapsed for moving for it.

The present Rule does not apply to appeals by motion from County Courts.‡

Rule 7.

In Admiralty actions the Court or a Judge shall have power at any stage of the proceedings in such action, upon a motion or summons by either party, calling upon the other party to show cause why the trial of such action should not take place on an early day, to be appointed by the Court or a Judge, to appoint that such trial shall take place on any day or within any time which to the Court or Judge shall seem fit; and for such purpose the Court or Judge shall have power upon such motion or summons to dispense with the giving of notice of trial, or to abridge the time or times appointed by these Rules for giving such notice,§ for the delivery of pleadings,|| or for doing any other act or taking any other proceeding in the action, upon such terms (if any) as the nature of the case may require.

This new Rule was added by the Rules of the Supreme Court, February, 1876.

ORDER LVIIA.

DIVISIONAL AND OTHER COURTS.

Rule 1.

The following proceedings and matters shall continue to be heard and determined before the Divisional Courts; but nothing herein contained shall be construed so as to take away or limit the power of a single Judge to hear and

* 1 Q. B. D., 636; 45 L. J. (Q. B.), 687; 35 L. T., 605; 24 W. R., 909.

† See Order XXXIX., Rule 1a.

‡ *Brown v. Shaw*, 1 Ex. D., 425.

§ Order XXXVI.

|| Orders XXI., XXII., and XXIV.

determine any such proceedings or matters in any case in which he has heretofore had power to do so, or so as to require any interlocutory proceeding therein heretofore taken before a single Judge to be taken before a Divisional Court :—

(1.) Proceedings on the Crown side of the Queen's Bench Division.

(2.) Appeals from Revising Barristers, and proceedings relating to Election Petitions. Parliamentary and Municipal.

(3.) Appeals under section 6 of the County Courts Act, 1875.

(4.) Proceedings on the Revenue side of the Exchequer Division.

(5.) Proceedings directed by any Act of Parliament to be taken before the Court, and in which the decision of the Court is final.

(6.) Cases stated by the Railway Commissioners under the 36 and 37 Vict. c. 48.

(7.) Cases of Habeas Corpus, in which a Judge directs that a rule *nisi* for the writ, or the writ, be made returnable before a Divisional Court.

(8.) Special cases where all parties agree that the same be heard before a Divisional Court.

(9.) Appeals from chambers in the Queen's Bench, Common Pleas, and Exchequer Divisions, and applications for new trials in the said Division [s] where the action has been tried with a Jury.

This new Rule was added by Rule 8 of the Rules of the Supreme Court, December, 1876.

The Rule is founded upon, and intended to carry out the principle of s. 17 of the Appellate Jurisdiction Act, 1876, by which it is enacted that "on and after the 1st of December, 1876, every action and proceeding in the High Court of Justice, and all business arising out of the same, shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single Judge."

So much of the sections of the Principal Act which define the constitution and functions of Divisional Courts as are inconsistent with the pro-

Order LVIIa., Rule 1. visions of that enactment are thereby repealed. These sections are the 40th, 41st, 42nd, 43rd, 44th, and 46th, and, for the extent of the repeal, the reader is referred to the notes to those sections, *supra*. The most important alteration is the omission from s. 41 of the Principal Act of the words which direct that ALL business, which according to the practice existing prior to the 1st of November, 1875, would have been proper to be transacted or disposed of by a Superior Court of Common Law, sitting *in BANCO*, may be transacted and disposed of by Divisional Courts. The effect of these words had been simply to substitute a Divisional Court of the Queen's Bench, Common Pleas, or Exchequer Division for the Court of Queen's Bench, Common Pleas, or Exchequer sitting *in banc*. This arrangement was highly conservative of the old practice, but by a proviso to the 17th section of the Appellate Jurisdiction Act, 1876, such business, and only *such* business, is to be transacted and disposed of by Divisional Courts, as may for the time being be *ordered by Rules of Court* to be heard by Divisional Courts; and the present Rule is an authoritative exposition of the business to be so transacted and disposed of. Any business formerly transacted and disposed of by a Superior Court of Common Law *in banc*, which is not mentioned in this Rule, or in section 45 of the Principal Act, and Order LVIII., Rule 19a, is presumably excluded from the cognizance of a Divisional Court of the High Court of Justice, and relegated to the tribunal of a single Judge, from whom, in certain cases,* a direct appeal to the Court of Appeal is now given.

"(1.) Proceedings on the Crown side of the Queen's Bench Division." "The Queen's Bench on its Crown side," says Mr. Serjeant Stephen,† "takes cognizance of all criminal causes, from treason down to the most trivial misdemeanour or breach of the peace." By Order LXII., *infra*, "nothing in these Rules shall affect the practice or procedure in proceedings on the Crown side of the Queen's Bench Division." (See *Regina v. Steel*,‡ *Regina v. Fletcher*,§ *Re Ellershaw*.|| "Criminal causes and matters within the exclusive cognizance of the Court of Queen's Bench, in the exercise of its original jurisdiction," are assigned to the Queen's Bench Division by s. 34 of the Principal Act.

"(2.) Appeals from Revising Barristers." By s. 60 of the 6 Vict. c. 18, these appeals lie to the Court of Common Pleas, and are transferred to the Common Pleas Division by s. 34 of the Principal Act. The decision of that Division on a registration appeal is final. See 6 Vict. c. 18, s. 66, and *Ashworth and others*, Appellants, v. *Hopper*, Respondent.¶ See *Roger on Elections*, 12th edn. (1876), by Wolferstan.

"Proceedings relating to Election Petitions, Parliamentary and Municipal." As to Parliamentary Election Petitions, see the Parliamentary Elections Act, 1868 (31 and 32 Vict. c. 125), and *Hardcastle on the Law and Practice of Election Petitions*. By ss. 2 and 5 of the Parliamentary

* See Order XL., Rule 4a, substituted for Rules 4 and 5 of the same Order by Rule 7 of the Rules of the Supreme Court, December, 1876.

† 4 Stephen's Comm., 307, 7th edn.

‡ 2 Q. B. D., 37; 46 L. J. (M. C.), 1; 35 L. T., 534.

§ 2 Q. B. D., 43; 46 L. J. (M. C.), 4; 35 L. T. 538.

|| 1 Q. B. D., 481.

¶ 1 Charley's Cases (Court), 52. As to the distribution of Revising Barristers among the Circuits, see s. 23 of the Principal Act, and the Order in Council of 27th June, 1876; W. N., 1876, p. 315.

Elections Act, the Court having jurisdiction under that Act in election petitions is defined to be the Court of Common Pleas. This jurisdiction was transferred to the Common Pleas Division by s. 34 of the Principal Act.*

Order LVIIa.,
Rule 1.

As to Municipal Election Petitions, see the Municipal Corporation Acts, edited by Rawlinson (6th edition, 1874, by Geary). The Court of Common Pleas is the Court which has jurisdiction under the Corrupt Practices (Municipal Elections) Act, 1872,† and this jurisdiction also was transferred to the Common Pleas Division by s. 34 of the Principal Act.

“(3.) Appeals under s. 6 of the County Courts Act, 1875.” By sect. 6 of the County Courts Act, 1875 (38 and 39 Vict. c. 50), “in any cause, suit, or proceeding, other than a proceeding in bankruptcy, tried or heard in any County Court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction, or decision of the Judge, at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction, or decision by motion to the Court to which such appeal lies, instead of by special case, such motion to be *ex parte* in the first instance, and to be granted on such terms as to costs, security, or stay of proceedings, as to the Court to which such motion shall be made shall seem fit. And if the Court to which the appeal lies be not then sitting, such motion may be made before any Judge of a Superior Court sitting in chambers.”

“The Court to which the appeal lies” is the Divisional Court established by s. 45 of the Principal Act,‡ *supra*, and Order LVIII., Rule 19a,§ *infra*. As all appeals from County Courts are to be, under these enactments, to a Divisional Court, the present provision seems hardly necessary.

“(4.) Proceedings on the Revenue side of the Exchequer Division.” “In the capacity of a Court of Law, on the Revenue side the Court of Exchequer,” says Mr. Serjeant Stephen,|| “ascertains and enforces, by proceedings appropriate to the case, the proprietary rights of the Crown against the subjects of the realm.” The procedure and practice in Crown suits in the Exchequer is regulated by the 28 and 29 Vict. c. 104, and Reg. Gen. Easter Term, 1866.¶ Nothing in these Rules affects such procedure or practice.** The jurisdiction of the Court of Exchequer “as a Court of Revenue,” is expressly transferred to the Exchequer Division by s. 34 of the Principal Act, *supra*.

“(5.) Proceedings directed by any Act of Parliament to be taken before the Court, and in which the decision of the Court is final.” The decision is final in the cases mentioned, *supra*, in (2),†† and *infra*, in (6).‡‡ All orders of the Court on a case stated by the justices under the 20 and 21 Vict. c. 43, s. 6, are “final and conclusive on all parties.” So are orders under the County Court Acts, the 13 and 14 Vict. c. 61, s. 14, the 19 and 20 Vict. c. 108, s. 68, and the 28 and 29 Vict. c. 99, s. 18.

* See s. 38 of that Act as to the *rota* of Judges for Election Petitions.

† The 35 and 36 Vict. c. 60, s. 2.

‡ See the note to that section and cases there cited.

§ Added by Rule 11 of the Rules of the Supreme Court, Dec., 1876.

|| 4 Steph. Comm., 340. ¶ See L. R., 1 Ex., 389. ** Order LXII.

†† 6 Vict. c. 18, s. 66; 31 and 32 Vict. c. 125, s. 11, subs. (16); 35 and 36 Vict. c. 60, s. 15, subs. (6).

‡‡ 36 and 37 Vict. c. 48, s. 26, which see, *infra*.

**Order LVIIa.,
Rule 1.**

The judgment of the Court in an interpleader issue, or in a decision of the Court in a summary manner under ss. 14 and 15 of the Common Law Procedure Act, 1860, is made by s. 17 of that Act "final and conclusive" against the parties, and all persons claiming by, from, and under them.

Where, by any Act of Parliament, it is provided that the decision of any Court shall be final, an appeal will not now lie from the decision in such a case of the High Court to the Court of Appeal.* It is an additional reason, therefore, that the jurisdiction of the Court should not be exercised by a single Judge in these cases, that any mistake on his part would be incurable.

"(6.) Cases stated by the Railway Commissioners under the 36 and 37 Vict. c. 48." By sect. 26 of the 36 and 37 Vict. c. 48 (the Regulation of Railways Act, 1873), the Railway Commissioners "shall in all proceedings before them under sects. 6, 11, 12 and 13 of that Act, and may if they think fit in all other proceedings before them at the instance of any party to the proceedings before them, state a case in writing for the opinion of any Superior Court determined by the Commissioners upon any question which in the opinion of the Commissioners is a question of law." "All orders of the Court under that section shall be final and conclusive on all parties."

"(7.) Cases of Habeas Corpus, in which a Judge directs that a rule nisi for the writ, or the writ be made returnable before a Divisional Court." "The writ of *Hab. Corp.* is usually," observes Mr. Kerr,† "returnable, if it issues in vacation, before the Judge himself who awarded it, and he proceeds by himself thereon, unless the term shall intervene, and then it may be returned into Court." For "term" read "sittings."

"(8.) Special cases where all parties agree that the same shall be heard before a Divisional Court." Order XXXIV., which contains the practice with regard to special cases, contemplates their being heard "by the Court," i.e., "by a Divisional Court." But special cases, it would seem, will only be heard in future by a Divisional Court, where "*all parties agree*" that it shall be so heard.

"(9.) Appeals from Chambers in the Queen's Bench, Common Pleas, and Exchequer Division[s]." These appeals, by Order LIV., Rule 6, are to be "to the Court" by motion, therefore presumably to a Divisional Court. The practice will remain unaltered.

"And applications for new trials in the said Division (*sic*), when the action has been tried by a Jury." This is in accordance with the new Rule 1a, substituted by Rule 5 of the Rules of the Supreme Court, December, 1876, for Rule 1 of Order XXXIX. "Where in an action in the Queen's Bench, Common Pleas or Exchequer Division (*sic*), there has been a trial by jury, the application for a new trial shall be to a Divisional Court."

Rule 2.

Where, by section 17 of the Appellate Jurisdiction Act, 1876, or by these Rules, any application ought to be made to, or any jurisdiction exercised by the Judge before whom an action has been tried, if such Judge shall die or cease

* S. 20 of the Appellate Jurisdiction Act, 1876.

† Kerr's Blackstone, Vol. III., p. 124, 4th edn. (1876).

to be a Judge of the High Court, or if such Judge shall be a Judge of the Court of Appeal, or if for any other reason it shall be impossible or inconvenient that such Judge shall act in the matter, the President of the Division to which the action belongs may, either by a Special Order in any action or matter, or by a General Order applicable to any class of actions or matters, nominate some other Judge to whom such application may be made, and by whom such jurisdiction may be exercised. Order LVIIa.,
Rule 2.

This new Rule was added by Rule 9 of the Rules of the Supreme Court, December, 1876.

The necessity for the Rule arises from the power of adjourning the case "for further consideration," given by Order XXXVI., Rule 22a, which was substituted for Rule 22, by Rule 3 of the Rules of the Supreme Court, December, 1876.

Rule 3.

Every Vacation Judge shall have the same power and authority as heretofore.

This new Rule was added by Rule 10 of the Rules of the Supreme Court, December, 1876.

The provisions as to Vacation Judges will be found in s. 28 of the Principal Act, *supra*, and Order LXI., Rules 5, 6 and 7, *infra*. The "power and authority" of Vacation Judges is not to be augmented by reason of the new power and authority conferred upon "a single Judge."

ORDER LVIII.

APPEALS.*

Rule 1.

Bills of exceptions and proceedings in error shall be abolished.

This Rule is a re-enactment of Rule 49 of the Principal Act.

The Rule is taken *verbatim* from the First Report of the Judicature Commission†:—"All proceedings in error and bills of exceptions," they recommended, "should be abolished."

The present Rule sweeps away the minute details of the Common Law Procedure Acts respecting procedure in error and on appeals.‡

* This Order only applies to appeals to the Court of Appeal, and not to appeals to the House of Lords. *Justice v. The Mersey Steel and Iron Company*, 1 C. P. D., 575; 24 W. R., 955; 2 Charley's Cases (Court), 142.
† P. 24.

‡ See the Act of 1852, ss. 146-167, and the Act of 1854, ss. 34-43.

**Order LVIII.,
Rule 1.**

It must not be supposed that the Common Lawyers in the House of Commons submitted, without a murmur, to the abolition of bills of exceptions and proceedings in error. Mr. (now Mr. Justice) Lopes, Q.C., gave notice of his intention to move the omission of this Rule in Committee, and Mr. Morgan Lloyd, Q.C., gave notice of his intention to move to leave out "bills of exceptions and," and to add at the end of this Rule, "Provided that nothing in this or the Principal Act contained shall deprive any party to an action of the right to tender a bill of exceptions to any ruling of a Judge which he would have had if the said Acts had not been passed."

These notices, however, were not acted upon.

Mr. Watkin Williams, Q.C., was more successful. He succeeded in persuading the Attorney-General (Sir R. Bagge) to accept a new clause, which now appears as s. 22 of this Act, and which appears to have restored bills of exceptions in a modified form, by enabling any party to "found" a motion in the Court of Appeal "upon an exception entered upon and annexed to the record."

Section 22 of this Act and the present Rule appear, not unnaturally, to have somewhat puzzled the Counsel for the defendants in the important case of *Cheese v. Lovejoy*,* which was an action to prove, in solemn form, the will of one John Harris, tried before Hannen, J., and a special jury, in the Probate Division. A bill of exceptions to his lordship's ruling was actually tendered at the trial, and notwithstanding the present Rule, the Judge ordered it to be "annexed to the record," under s. 22 of this Act. The question then arose, "What will the Court of Appeal do with it?" The defendant's Counsel applied, *ex parte*, to the Court of Appeal for "directions." "Our difficulties," they said, "are twofold—(1) that all bills of exceptions are now abolished by Order LVIII., Rule 1; and (2) that there is now no record to which the 'exception' can be 'annexed.'" They pointed out that s. 22 of this Act gave them the option of coming direct to the Court of Appeal. The Court of Appeal were of opinion that the proper mode of bringing the exceptions before them was to give notice of motion of appeal from the Judge's ruling.

Rule 2.

All appeals to the Court of Appeal shall be by way of re-hearing,† and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part.

This Rule is a re-enactment of Rule 50 of the Principal Act.

The first clause of this Rule is copied *verbatim* from the First Report of

* 25 W. R., 453.

† This does not apply to Bankruptcy appeals. *In Re Walton, Ex parte Reddish*, 25 W. R., 741; W. N., 1877, p. 150.

the Judicature Commissioners,* who advised that “every appeal should be deemed to be in the nature of a re-hearing, and should be brought by notice of motion, in a summary way, without any petition or formal procedure.” Order LVIII.,
Rule 2.

Prior to this enactment appeals by way of re-hearing were usually heard on *petition*, and only orders made upon motion were heard upon motion † so that this Rule involves a considerable change even in Chancery practice, from which the procedure of this Order is, for the most part, taken.‡

The appeal under the Common Law Procedure Acts, 1854 and 1860, was by way of *case* stated. See s. 39 of the Act of 1854 and s. 9 of the Act of 1860. As to the quorum of Judges, see s. 12 of this Act, *supra*.

As to the jurisdiction of the Court of Appeal, see s. 19 of the Principal Act, and the note thereto, *supra*.

An action is not “pending” in the Court of Appeal until the notice of the appeal has been served.§ Until such service there is indeed *no* appeal.||

On the argument of appeals the Court of Appeal will hear two Counsel on each side.¶

“Appeals to the Court of Appeal.” Prior to the commencement of the Supreme Court of Judicature Acts, an appeal lay direct to the House of Lords from any order or decree of the Master of the Rolls or of the Vice-Chancellors, which had been *inrolled*. Inrolment is now, however, a useless ceremony. No appeal lies from the High Court of Justice to the House of Lords; and the High Court of Justice cannot, by inrolling its orders or decrees oust the jurisdiction of the Court of Appeal.**

Except in very extreme cases, where serious injustice would be done, the Court of Appeal will not entertain an appeal from the order of a Judge at chambers, striking out pleadings as embarrassing, under Order XXVII., Rule 1†† (See the note to that Rule, where the principles on which the Court of Appeal acts in these cases are fully stated.)

A Rule *nisi* was granted by the Court of Appeal calling upon a County Court Judge to show cause why he should not sign a case for an appeal; but on cause being shown, the rule was discharged.‡‡

* First Report, p. 24.

† See Daniel's Chancery Practice, chap. xxxii., s. ii.

‡ The Rule clearly repeals Order XXXI., Rule 8, of the Consolidated Orders of that Court.

§ Per Mellish, L. J., in *Wilson v. Smith*, 34 L. T., 471.

|| *In Re Gilbert, Ex parte Viney*, 4 Ch. D., 794; 46 L. J. (Bankruptcy), 80; 36 L. T., 41.

¶ 1 Ch. D., 1; *Snecsbey v. The Lancashire and Yorkshire Railway Company*, 1 Q. B. D., 42; 45 L. J. (Q. B.), 1; 33 L. J., 372; 24 W. R., 99.

** *Hastie v. Hastie*, 2 Ch. D., 304; 34 L. T., 747; 24 W. R., 564. But see *Allan v. The United Kingdom Telegraph Company*, 24 W. R., 898; 2 Charley's Cases (Court), 10.

†† *Golding v. The Wharton Railway and River Saltworks Company, Limited*, 1 Q. B. D., 374; 34 L. T., 374; 24 W. R., 423; *Watson v. Rodwell*, 3 Ch. D., 380; 45 L. J. (Ch.), 744; 35 L. T., 86; 24 W. R., 1009.

‡‡ *Sharrock v. The London and North Western Railway Company*, 1 C. P. D., 70; 33 L. T., 341; 24 W. R., 346; on appeal, *Times*, November 23rd and December 18th, 1875; 1 Charley's Cases (Court), 165, 167, 169, 171. But see *Clarke v. Roche*, 36 L. T., 727.

Order LVIII., Notice of interlocutory appeals should be given to the other side, and
Rule 3. the cases be regularly placed on the paper for the day.*

Rule 3.

The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may seem just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as to the Court of Appeal may seem fit.

This Rule is a re-enactment of Rule 51 of the Principal Act.

At the foot of a petition of appeal in Chancery it was necessary to state the names of the parties intended to be served.†

A petition of appeal in Chancery was not itself served upon the parties, but they might obtain copies of it from the appellant's solicitor, or in default, office copies from the Report Office. The order for setting down the petition for hearing was served, but it might be served only two days before the hearing.‡ A similar interval was all that was necessary in the case of appeal motions.

The twenty-one days within which an appeal from an interlocutory order must (under Rules 9 and 15 of this Order) be brought, run from the date of the service of the notice of appeal under this Rule.§

“The Court of Appeal may direct notice of the appeal to be served on any parties to the action.” Where a defendant, who was unsuccessful at the trial, obtained a rule *nisi* against the plaintiff for a new trial, and the Court below discharged the rule *nisi*, and the unsuccessful defendant appealed, the Court of Appeal, under the power conferred by these words, directed notice of the appeal to be served on the defendant who was successful at the trial, and that until notice of the appeal had been so served, the case should stand over.||

* *Reed v. Pritchard*, *Times*, November 18th, 1875; 1 Charley's Cases (Court), 172. Per the Court of Appeal.

† Chancery Order of 19th March, 1869.

‡ Daniel's Chancery Practice, pp. 1352 and 1356.

§ *Ex parte Saffery, In Re Lambert*, 5 Ch. D., 365; 36 L. T., 532; 25 W. R., 572.

|| *Purnell v. The Great Western Railway Company and Harris*, 1 Q. B. D., 636; 45 L. J. (Q. B.), 687; 34 L. T., 822; 24 W. R., 72.

By an order in an administration suit a fund was directed to be paid to A., one of three claimants. B., one of the other claimants, appealed, but only served notice of the appeal on A. It was held by the Court of Appeal that B. must serve notice of the appeal on C., the remaining claimant, as well as on A., though C. did not appeal from the order; and the appeal was directed to stand over under this Rule for a week for notice to be served by B. on C.*

Order LVIII.,
Rule 3.

Rule 4.

Notice of appeal from any judgment, whether final or interlocutory, shall be A FOURTEEN DAYS' NOTICE, and notice of appeal from any interlocutory order shall be A FOUR DAYS' NOTICE.

Only *two days'* notice, as we have seen,† was necessary for the hearing of petitions of appeal and appeal motions in Chancery. See the note to Rule 9 of this Order, *infra*, as to the length of notice in appeals from the Court of Bankruptcy, and the note to Rule 15 of this Order, *infra*, as to the length of notice hitherto in appeals from the Court of Admiralty. The latter part of this Rule is taken from s. 37 of the Common Law Procedure Act, 1854.

Rule 5.

The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of First Instance, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court,‡ by affidavit, or by deposition taken before an examiner or Commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court. THE COURT OF APPEAL SHALL HAVE POWER TO GIVE ANY JUDGMENT AND MAKE ANY ORDER

* *Hunter v. Hunter* (1), 24 W. R., 584.

† Note to Rule 3 of this Order, *supra*.

‡ 15 & 16 Vict. c. 86, s. 39.

Order LVIII., WHICH OUGHT TO HAVE BEEN MADE, AND TO MAKE SUCH Rule 5.

FURTHER OR OTHER ORDER AS THE CASE MAY REQUIRE. The powers aforesaid may be exercised by the said Court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied; and such powers may also be exercised in favour of all any or of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. The Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal as may seem just.

This Rule is a re-enactment of Rule 52 of the Principal Act.

"Amendment." See Order XVI., Rule 13, and Order XXVII.—By the Common Law Procedure Act, 1852, s. 222, the proceedings in error, like other proceedings, might have been amended.*

It would seem that the rules with respect to amendment at the hearing of a cause in the Court of Chancery applied to the giving leave to amend at the hearing of an appeal.†

The initial words of this Rule, "the Court shall have all the powers and duties as to amendment, and otherwise, of the Court of First Instance," enable the Court of Appeal to enlarge the time or do any other act that is necessary.‡

"Further evidence." Upon a rehearing it was not in general competent to either party to enter into any new evidence. But an application on motion or petition, which had failed below, might have been renewed before the Court of Appeal on fresh evidence.§

Where the Court below refused to allow the Counsel for the plaintiff (appellant) to adduce further evidence, *after the defendant's Counsel had summed up the evidence for the defence*, to show that confusion had arisen from the double signification of a word, the Court of Appeal admitted the further evidence, and, on the strength of it, reversed the decision of the Court below.||

"Matters which occurred after the date of the decision." Under the former Chancery practice no evidence was allowed to be given as to matters which had occurred since the original hearing.¶ This practice is now changed.

"Questions of fact." A Probate cause, which was pending on the 1st

* Archbold's Practice, p. 555.

† Daniel's Chancery Practice, p. 1356: *The President of St. Mary Magdalen v. Sibthorpe*, 1 Russ., 154.

‡ *Purnell v. The Great Western Railway Company and Harris* (2), 1 Q. B. D., 636; 45 L. J. (Q. B.), 687; 35 L. T., 605; 24 W. R., 909, in the Court of Appeal,

§ *Addison v. Hindmarsh*, 1 Vern., 422; *Re European Bank*, L. R., 5 Ch., 358, 362.

|| *Bigsby v. Dickinson*, 4 Ch. D., 24; 46 L. J. (Ch.), 280; 25 W. R., 89.

¶ *Lambe v. Orton*, 33 L. J. (Ch.), 81.

of November, 1875, was heard by a Judge of the Probate Division without a Jury under the Court of Probate Act, 1857, Rule 47. The Judge decided the issues of fact raised by the pleadings, and pronounced a decree in the plaintiffs' favour. From this decree the defendants appealed to the Court of Appeal. On the opening of the appeal the plaintiffs submitted that, as the rules of the Probate Court remained in force under s. 18 of this Act, the defendants should have applied under the Court of Probate Act, 1857, for a rehearing; and that, having neglected to do so, the Judge's finding must be treated as being as conclusive as the verdict of a jury. The Court of Appeal decided that it was not obligatory on the defendants to have applied for a rehearing, and that they might treat the decree as a final decree in the cause, and appeal from it on the facts, as well as on the law.*

Order LVIII.,
Rule 5.

"Special leave of the Court." Where a party is desirous of adducing further evidence upon an appeal, it is sufficient for him to give the other side notice that he will apply *at the hearing* for special leave to adduce such evidence.†

"The Court of Appeal shall have power to give any judgment and make any order which ought to have been made, and *to make such further or other order as the case may require.*" "Larger words, I think," said Jessel, M.R., when delivering judgment in *Purnell v. The Great Western Railway and Harris*,‡ "could not be inserted." In the case just mentioned, which was an action for damages for an injury caused by negligence against a railway company and its contractor, the Court of Appeal held that by virtue of these words they had power to call upon the contractor (who was exonerated from blame by the verdict of the jury at the trial; and (2) by the decision of the Queen's Bench Division, which discharged a rule *nisi* obtained by the railway company against the plaintiff for a new trial) to show cause to the Court of Appeal why a new trial should not be granted *as against him*, as well as against the plaintiff, although no rule had been moved for as against him in the Queen's Bench Division, and the time for moving for it had long expired.

By an order in an administration suit, a fund which, according to the construction to be put upon a will and codicil, was payable to A., or B. or C., was directed by Bacon, V.C., to be paid A. B. appealed, but only served notice of appeal on A. The Court of Appeal ordered notice of appeal to be served on C. B.'s appeal was dismissed, and it was then decided that it was open to the Court of Appeal to entertain an appeal by C. for a reversal of the decision of Bacon, V.C., although C. had given no notice of appeal. All that a respondent could ask for, when a co-respondent sought relief against him without notice, was further time; and, at the instance of A., the Court of Appeal accordingly ordered the appeal to stand over for fourteen days, when it would be on the paper for the hearing of the appeal of C. against A.§

Where there was an appeal from the decision of the Common Pleas Division upon a rule to enter a nonsuit or verdict, which brought into

* *Sugden v. Lord St. Leonards*, 1 P. D., 154; 45 L. J. (P. D. and A.), 49; 34 L. T., 372; 24 W. R., 860; 2 Charley's Cases (Court), 160.

† *Justice v. The Mersey Steel and Iron Company, Limited*, 24 W. R., 199; *In Re the Coal Economising Gas Company*, 45 L. J. (Ch.), 88.

‡ 1 Q. B. D., 636; 45 L. J. (Q. B.), 687; 35 L. T., 605; 24 W. R., 909.

§ *Hunter v. Hunter* (2), 24 W. R., 527.

Order LVIII. question the correctness of a previous decision of the same Division upon a demurrer in the same case, and the Court of Appeal overruled the decision of the Common Pleas upon the rule; the Court of Appeal, although no notice of appeal had been given from the decision on the demurrer, treated it as under appeal, and overruled it also.*

“Any judgment which ought to have been made.” This is copied from s. 41 of the Common Law Procedure Act, 1854:—“The Court of Appeal shall give such judgment as ought to have been given in the Court below. The Common Law Procedure Act, 1852, s. 157, has a similar provision:—“The Courts of Error shall in all cases have power to give such judgment as the Court from which error is brought ought to have given, without regard to the party alleging error.”

“The costs.” The costs of a rehearing in the Court of Chancery were in the discretion of the Court;† but, generally, if an appeal was dismissed, it was so with costs.‡ When an appeal was partly successful only, no costs of appeal were usually given; but there was no rule against giving a successful appellant all his costs.§

By s. 42 of the Common Law Procedure Act, 1854, the Court of Appeal had “power to adjudge payment of costs;” and the ordinary practice under that enactment was to adjudge costs of appeal to a successful respondent, but not to a successful appellant.||

The present Rule leaves the costs to the discretion of the Court of Appeal.

The Court of Appeal, however, after consideration, has announced, that as a general rule, costs shall follow the event, and when a judgment is reversed, the appellant shall be allowed his costs. The old practice as to costs has been adopted only in appeals found standing for argument on the 1st of November, 1875.¶

The Rules as to costs laid down by the Court of Appeal are binding on the Court of Bankruptcy. The Rule, therefore, laid down by the Court of Appeal, that in general a successful appellant shall have his costs of appeal, will be followed by the Court of Bankruptcy, on appeals from County Courts.**

If the appellant merely serves a four days' notice of appeal from an interlocutory order, and takes no steps to have the appeal set down for hearing, under Rule 8 of this Order, *infra*, the Court of Appeal has no seizin of the appeal, and cannot make an order for payment of the respondent's costs, unless the respondent himself gives notice of motion, and brings the matter on as a substantive application.††

It would appear that, notwithstanding the wide powers, as to costs, given to the Court of Appeal by this Rule, that Court will not reopen an

* *Rhodes v. The Airedale Drainage Commissioners*, 12 N. C., May 13th, 1876.

† *Webster v. Cook*, L. R., 2 Ch., 542, 648.

‡ *MacCalmont v. Rankin*, 2 De G. M. & G., 403, 426.

§ *Collins v. Burton*, 4 De G. & J., 612, 619.

|| *Barker v. Windle*, 6 E. & B., 675.

¶ 1 Ch. D., 1. See *Olivant v. Wright*, 45 L. J. (Ch.), 1.

** *Ex parte Masters, Re Winson*, 1 Ch. D., 113; 45 L. J. (Bankruptcy), 18; 33 L. T., 613; 24 W. R., 113; 1 Charley's Cases (Court), 172. Per Bacon, V.C., Chief Judge.

†† *Webb v. Mansell*, 2 Q. B. D., 117; 25 W. R. 389.

order, which it otherwise affirms, merely for the purpose of varying the **Order LVIII., Rule 5.**
order as to costs in the Court below.*

Rule 6.

It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied, he shall, within the time specified in the next Rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs.

This Rule is a re-enactment of Rule 53 of the Principal Act.

"Cross Appeal."—In the Court of Chancery, as between the respondent and the parties *other than* the appellant, only the point appealed from was open to the respondent.† Therefore, where there was an appeal against part of a decree, and the respondent or some other party felt himself aggrieved by another part, not affecting the interest of the appellant, he was obliged to present a cross-appeal. The appeal and the cross-appeal might then be heard at the same time, and one order be made in both.‡

The present Rule renders this practice no longer necessary, and makes other provisions to meet such a case when it arises.

If a respondent wishes to contend that an order of the Court below, depriving him, though successful, of his costs in the Court below, ought to be varied by the Court of Appeal, he must give notice of his intention to move under this Rule.§

It would seem, however, from the language of the Court of Appeal, in the case in which this was decided, and also in the more recent case of *In Re The New Gas Company*,|| that under the new practice the Court of Appeal will not open the whole order (which it otherwise affirms) merely for the purpose of varying the order as to costs in the Court below.

* *In Re The New Gas Company*, 25 W. R., 643; *Lee v. Clutton*, 24 W. R., 942; *Harris v. Aaron*, 4 Ch. D., 749; 25 W. R., 353.

† *Lord Broke v. Earl of Warwick*, 13 Jur., 547, L.C.

‡ *Blackburn v. Jepson*, 2 V. and B., 359.

§ *Harris v. Aaron*, 4 Ch. D., 749; 25 W. R., 353.

|| 25 W. R., 643.

Order LVIII.,
Rule 7.

Rule 7.

Subject to any special order which may be made, notice by a respondent under the last preceding Rule shall, in the case of any appeal from a final judgment, be an eight days' notice, and, in the case of an appeal from an interlocutory order, a two days' notice.

"Two days' notice."—See notes to Rules 3 and 4 of this Order, *supra*. See *Harris v. Aaron*,* cited under the last preceding Rule.

Rule 8.

The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order, or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals, and it shall come on to be heard according to its order in such list, unless the Court of Appeal or a Judge thereof shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal.

If the appellant merely gives notice of appeal, and then neglects to take any further proceedings under this Rule, the Court of Appeal will have no seizin of the appeal, and cannot even make an order for payment of the respondent's costs, unless the respondent himself moves for his costs upon notice.†

"Produce the order."—This is in accordance with the former practice of the Court of Chancery with regard to appeal motions. They were set down by the Order of Course Clerk in the Registrar's Office upon the production of the order appealed from, or an office copy of it, and upon filing with him a copy of the notice of motion.‡

"Set down the appeal by entering the same in the proper list." The appellant must take care that the appeal is set down before the day named for the hearing in the notice of appeal; otherwise the appeal will be dismissed as an abandoned motion. The time is not saved by inserting after the date named for the hearing, "or so soon thereafter as Counsel can be heard."

* 4 Ch. D., 749; 25 W. R., 353.

† *Webb v. Mansell*, 2 Q. B. D., 117; 25 W. R., 389.

‡ *In Re The National Funds Assurance Company*, 4 Ch. D., 303; 46 L. J. (Ch.), 183; 25 W. R., 158. The notice was for August 16th, and the application to the officer to set down on the 16th of November.

On an appeal from *the refusal* of an interlocutory application it is not necessary to produce to the officer, under this Rule, "the judgment or order, or an office copy thereof." In the case in which this was decided the respondents delayed furnishing the appellants with office copies of the interlocutory orders appealed from till after the twenty-one days limited by Rule 15, *infra*, for appealing had expired.*

Order LVIII.,
Rule 8.

Rule 9.

The time for appealing from any order or decision made or given in the matter of the winding-up of a company under the provisions of the Companies Act, 1862, or any Act amending the same, or any order or decision made in the matter of any bankruptcy, or in any other matter not being an action, shall be the same as the time limited for appeal from an interlocutory order under Rule 15.

This Rule "expressly varies" Rule 143 of the Reg. Gen. of 1870, made in pursuance of the Bankruptcy Act, 1869, that an appeal against a decision or order of the Chief Judge in Bankruptcy shall be entered with the Registrar of Appeals within 21 days *from such decision or order*, the same period which is limited in all cases of interlocutory appeals by Rule 15 of this Order, *infra*. The appeal may be brought under the present Rule at any time within 21 days from the *signing* of the order appealed from, though more than 21 days have elapsed since the order (or decision) was *pronounced*.† By s. 124 of the Companies Act, 1862, "re-hearings of and appeals from any order or decision made or given in the matter of the winding-up of a company may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction." Three weeks' notice of appeal must be given under the same section, unless the time be extended by the Court of Appeal.

"Any order made or given in the matter of the winding-up of a Company." An appeal from the order to wind up a company is within this Rule. If it does not fall under the words just cited, it at least falls under the words, "any order made in any other matter not being an action.‡

An appeal from an order made on a petition under the Trustee Relief Act falls within the words, "any order made in any other matter, not being an action."§

In *The New River Company v. The Midland Railway Company*,|| it was decided that an issue stated under the Regulation of Railways Act, 1868 (31 and 32 Vict. c. 119), s. 41, to try a question of compensation, was not "a decision made in a matter not being an action."

* *Smith v. Grindley*, 3 Ch. D., 80; 35 L. T., 112; 24 W. R., 956.

† *In Re Lewer, Ex parte Garrard*, 5 Ch. D., 61; 46 L. J. (Bkcy.), 70; 25 W. R., 364.

‡ *Re The National Funds Assurance Company*, 4 Ch. D., 303; 35 L. T., 689; 46 L. J. (Ch.), 183; 25 W. R., 158.

§ *In Re Baillie's Trusts*, 4 Ch. D., 785; 46 L. J. (Ch.), 330; 35 L. T., 917.

|| 36 L. T., 539.

**Order LVIII,
Rule 9.**

In *Sharrock v. The London and North Western Railway Company*,* in which a rule *nisi* was granted on an *ex parte* application, on appeal under this Rule, cause was shown before the Court of Appeal. The time for appealing was previously enlarged, by the Court below, to a week beyond the four days allowed by this Rule.†

Rule 10.

Where an *ex parte* application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within four days from the date of such refusal, or within such enlarged time as a Judge of the Court below or of the Appeal Court may allow.

When an order was made by the Lord Chancellor on an *ex parte* application, it was the practice to introduce into the order a provision that the other party should be at liberty to apply to the Judge to whose Court the cause was attached to vary or discharge it.‡

In *Shand v. Bowes*,§ the Court of Appeal, upon an appeal *ex parte* under this Rule from the refusal by the Common Pleas Division of an order *nisi* for a new trial, on the ground that the verdict was against the weight of evidence, granted the order *nisi*.

A new trial having been refused by the Court below, the time for appealing was enlarged by Lush, J., at chambers, from four days to a fortnight, the plaintiff (appellant) paying the money recovered at the trial into Court.||

Rule 11.

When any question of fact is involved in an appeal, the evidence taken in the Court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows :

(a.) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits

* 1 O. P. D., 170 ; 24 W. R., 346 ; 1 Charley's Cases (Court), 165, 167, 169.

† 1 Charley's Cases (Court), 167 ; *Times*, November 8th, 1875.

‡ *George v. Whatworth*, 4 L. J., Ch., N. S., 61, 62. See *Lindsay v. Tyrrell*, 2 De G. & L. J., 7.

§ 11 N. C., 14. The Court of Appeal was in some doubt as to whether cause should be shown in the Court below or in the Court of Appeal.

|| *Hall v. Smith*, 1 Charley's Cases (Chambers), 129.

as have been printed, and office copies of such of them as have not been printed. Order LVIII.,
Rule 11.

(b.) As to any evidence given orally, by the production of a copy of the Judge's notes, or such other materials as the Court may deem expedient.

This Rule is substituted for Rule 54 of the Principal Act, the words "in such manner as may be directed" being omitted after the words "Court of Appeal," and the two subsections (a) and (b) added.

Subsection (a) of this Rule is explained by the Order of the Court of Chancery of the 16th May, 1862, by which it is provided, that all affidavits on the hearing of any cause on which issue shall have been joined, or on a notice of motion for a decree, shall be *printed*, except affidavits filed for the purpose of any interlocutory application, of which *office copies* shall have been taken for that purpose.

Order XXXVIII., Rule 4, *supra*, also provides that where evidence in any action is taken by affidavit it shall be printed. See, also, Order III. of the Rules of the Supreme Court (Costs).

Subsection (b) of this Rule is in accordance with the practice of the Court of Chancery; the Chancery Order of the 5th February, 1861, Rule 14, providing that "upon any appeal or rehearing by way of appeal the Judge's notes of the *vivâ-voce* evidence shall, *primâ facie*, be deemed to be a sufficient note thereof."

"Evidence taken by affidavit." The Court of Appeal has no officers of its own with whom the affidavits intended to be used on appeal can be filed. Affidavits intended to be used on appeal should, therefore, be filed with the proper officer of the Division of the High Court from which the appeal is brought.*

"Office copies of such of them as have not been printed." Where the affidavits read at the hearing in the Court below were very voluminous, and had not been printed, the Court of Appeal, on the application of the plaintiff (appellant), in order that expense might be saved, dispensed with the requirement that printed copies must be produced on appeal, and ordered the officer in charge of the affidavits to attend in Court, on the hearing of the appeal, with the affidavits for the use of the Court of Appeal.†

In a similar case, the Court of Appeal, on an *ex parte* application of the defendants (appellants), in order that an expense of £100 for office copies of the affidavits for each of the Judges might be saved, directed that it would be sufficient that (together with the briefs of the junior Counsel in the case) the office copies of their own affidavits taken by the solicitors on either side, and the ordinary copies supplied by them to the solicitors on the other side, should be produced for the use of their lordships.‡

"The production of a copy of the Judge's notes." Considerable inconvenience was caused to the Court of Appeal, at its earlier sittings, by the absence of the Judge's notes, when the appeal was called on. The Lord

* *Watts v. Watts*, 45 L. J. (Ch.), 658; 24 W. R., 623.

† *Sickles v. Morris*, 45 L. J. (C.P.), 148; 24 W. R., 102; 1 Charley's Cases (Court), 174.

‡ *Crawford v. The Hornsey Steam Brick and Tile Works Company*, 34 L. T., 923; 24 W. R., 422.

Order LVIII, Rule 11. Chief Justice intimated on one occasion that "the Judge's clerks found it difficult to copy the Judge's notes fast enough, the cases came on so quickly." *

"Or such other materials as the Court may deem expedient." In *Leadley v. Sykes*,† the defendant was cross-examined *visd voce* in Court on his affidavit, but no shorthand notes of his evidence were taken. The Court of Appeal said that a proper record of *visd-voce* examinations of the parties in the Court below must be secured for the use of the Court of Appeal.

In *Crawford v. The Hornsey Steam Brick and Tile Works Company*,‡ Malins, V.C., directed that the taxing master, in taxing the plaintiff's (respondent's) costs of the appeal, should allow the shorthand writer's charges for taking the cross-examination, in the Court below, of witnesses, who had made affidavits in favour of the plaintiff, and of the copies for Counsel.

Rule 12.

Where evidence has not been printed in the Court below, the Court below or a Judge thereof, or the Court of Appeal or a Judge thereof, may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court of Appeal or a Judge thereof shall otherwise order.

See Orders I. and II. of the Rules of the Supreme Court (Costs), *infra*.

The last clause of this Rule places a most salutary check on the system of indiscriminate printing, which makes appeals so expensive to the suitor.

Where an appellant had caused shorthand notes of the *visd-voce* examination and cross-examination of witnesses in the Court below to be taken and transcribed, and, without obtaining any leave under this Rule, either from the Court below or from the Court of Appeal, had had these notes printed for the use of the Court of Appeal, and both sides had used them on the hearing of the appeal, the Court of Appeal allowed the appellant his costs of transcribing the notes and printing them, as the appeal could not have been heard without them. §

* *Times*, Wednesday, February 23rd, 1876. See, also, *Woodley v. The Metropolitan District Railway Company*, *Times*, Friday, February 23rd, 1876.

† W. N., 1875, p. 252; 1 Charley's Cases (Court), 175; *Times*, December 4th, 1876. See, also, *Turnbull v. Janson*, *Times*, February 1st, 1877; and *Atkinson v. The Newcastle and Gateshead Waterworks Company*, *Times*, January 18th, 1877.

‡ W. N., 1876, p. 215. The taxing master had disallowed the item, on the ground that he had no authority to allow shorthand notes of evidence.

§ *Bigsby v. Dickinson*, 4 Ch. D., 24; 46 L. J. (Ch.), 280; 25 W. R., 59, 122.

A copy of the Judge's notes was, on application at chambers, ordered by Lindley, J., to be printed, under this Rule, for the purposes of the appeal.* **Order LVIII,
Rule 13.**

Rule 13.

If, upon the hearing of an appeal, a question arise as to the ruling or direction of the Judge to a jury or assessors, the Court shall have regard to verified notes or other evidence, and to such other materials as the Court may deem expedient.

This Rule is a re-enactment of Rule 55 of the Principal Act.

"Upon appeals proof of a Judge's ruling by a *shorthand writer's notes*, ought, in our opinion, to be received." First Report of the Judicature Commission, p. 24. See Rule 11 (b) of this Order, *supra*.

Rule 14.

No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may seem just.

This Rule is a re-enactment of Rule 56 of the Principal Act.†

This Rule is copied almost *verbatim* from the First Report of the Judicature Commission,† who recommended that "no interlocutory order from which there has been no appeal, should operate so as to bar or prejudice a decision upon the merits."

"The object of this Rule was to prevent parties from being prejudiced by their having omitted to appeal from an interlocutory order. The whole thing is to be open *on the merits* before the Court of Appeal, on appeal from the final order." Per Mellish, L.J., in *Sugden v. Lord St. Leonards*.‡

There may be cases in which an order made on an interlocutory application may have incidentally involved a decision of the action on its merits. For instance, in one case an interlocutory order had been made for the maintenance of an infant out of a particular fund, it being only possible to justify the order on the ground that the infant was entitled to the fund. By the decree subsequently made the infant was held entitled to the fund. On an appeal being brought from the decree, the Court decided that the appeal could not be maintained, because no appeal had been brought from the interlocutory order for maintenance. The present Rule is intended to prevent such a result as that. Per Jessel, M.R., in *White v. Witt*.§

* 2 Charley's Cases (Chambers), 69.

† P. 24.

‡ 1 P. D., 208.

§ 25 W. R., 435; 12 N. C., 61.

Order LVIII.,
Rule 15.

Rule 15.

No appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. The said respective periods shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal.

This Rule is a re-enactment of Rule 57 of the Principal Act, the words, "or from such time as may be prescribed by Rules of Court," being omitted, as inapplicable to the present Act.

The periods fixed by this Rule are, generally speaking, very much shorter than those previously sanctioned by the Legislature in each of the Courts.

"For appeals and rehearings in Chancery," observe the Judicature Commissioners, "a period of *five years** from the date of the decree or order appealed from is allowed, after which the leave of the Lord Chancellor or Lords Justices is necessary, and such leave may be given at any time, but will only be given if it shall appear, under the peculiar circumstances of the case, to be just and expedient.

"At Common Law *six years*† from the date of final judgment are allowed for bringing error to the Exchequer Chamber. In cases of appeal as distinguished from error, in the Common Law Courts, notice of appeal must be given *within four days*‡ after the decision appealed from, unless the time is enlarged.§ When such notice is given, which for want of opportunity of full consideration it generally is, *no time* is limited within which the party must proceed to prosecute his appeal.

"In the Probate Court || application for leave to appeal from an interlocutory decree or order must be made *within a month* after the delivery of the decree or order, or within such enlarged time as the Court may direct, and it may be doubted whether any time is limited for appealing from decrees or orders.

"Appeals from the Court of Admiralty must be founded either on notice given to the registrar *immediately* after the delivery of the judgment, or upon a declaration, called a 'Protocol of Appeal,' and made before a notary

* Order XXXI., Rule 1, of the Consolidated Orders of the Court of Chancery.

† Common Law Procedure Act, 1852, s. 146.

‡ Common Law Procedure Act, 1854, s. 37.

§ *Loveland v. Lumley*, 5 H. and N., 656.

|| Rules of the Court of Probate, Rule 87.

and witnesses *within 15 days*, and must be prosecuted by presenting a petition of appeal to your Majesty in Council *within one year** from the date of the sentence or decree appealed from." Order LVIII.,
Rule 15.

Having given this statistical review of the question,† the Judicature Commission proceeded to recommend‡ that "the time for appealing from interlocutory orders made in the progress of a suit, before the final decision upon the merits between the parties, ought to be regulated by general orders. In all other cases a fixed period, *not exceeding 6 months* from the time when any judgment, decree, rule, or order is made or entered upon the record, should be allowed for appealing against it."

It will be seen that the framers of this Rule have followed an independent course. They have adopted, as to the time within which an appeal must be brought from an interlocutory order, the rule laid down as to appeals from the Chief Judge in Bankruptcy (see note to Rule 9 of this Order, *supra*)§—and they have adopted, as to the time within which an appeal must be brought in other cases, the practice of the Court of Admiralty.

"Special leave" to appeal, after the time for appealing has expired, will not be granted on an application *ex parte*. The appellant should serve the respondent with notice of the motion for special leave.||

A mistake on the part of the appellant or his solicitor as to the time within which the appeal ought to have been brought under this Rule, is no ground for granting "special leave" to appeal;¶ neither is a mistake, on the part of an official of the Supreme Court, misleading the appellant's solicitor as to the time for bringing an appeal.**

In an action commenced before the 1st of November, 1875, application for leave to appeal from an order made more than a year previously by the Court of Exchequer, allowing a demurrer to one of the pleas on the record, was granted by the Court of Appeal although issues of fact remained to be tried in a pending action.††

In *Taylor v. Greenhalgh*,‡‡ two actions brought, the one by A, and the other by B, against C, in respect of *the same* accident, which occurred through C's negligence, resulted in verdicts for A and B, with leave to C to move for a nonsuit. C moved the Court of Queen's Bench, accordingly; a rule *nisi* was obtained, and in July 1874, was made absolute. A and B both appealed within four days after the rule was made absolute, pursuant to s. 37 of the Common Law Procedure Act, 1854. A prosecuted his appeal, and succeeded in getting the decision of the Court of Queen's Bench reversed, November 8th, 1875. Final judgment was, meanwhile,

* A year and a day. Williams and Bruce's Admiralty Practice, p. 314.

† First Report, pp. 22, 23.

‡ *Ib.*, p. 24.

§ In the Court of Probate no appeal from an interlocutory order could be lodged without the leave of that Court. 20 and 21 Vict. c. 77, s. 39.

|| *Evennett v. Lawrence*, 4 Ch. D., 139; 25 W. R., 107; 46 L. J. (Ch.), 119.

¶ *Swindell v. The Birmingham Syndicate, The Birmingham Syndicate v. Swindell*, 3 Ch. D., 127; 45 L. J. (Ch.), 756; 35 L. T., 111; 24 W. R., 911; *Trail v. Jackson*, 4 Ch. D., 7; 46 L. J. (Ch.), 16; 25 W. R., 36.

** *In Re Gilbert, Ex parte Viney*, 4 Ch. D., 794; 46 L. J. (Bank.), 80; 36 L. T., 41.

†† *Lord Otho Fitzgerald v. Dawson*, 45 L. J. (Ex.), 152; 24 W. R., 129; 1 Charley's Cases (Court), 177.

‡‡ 24 W. R., 311; 2 Charley's Cases (Court), 29.

Order LVIII. signed by C against B, and B's summons to stay execution was dismissed.
Rule 15. To prevent execution from issuing, B, in September, 1874, paid C the costs in his action. On the 18th of January, 1876, B gave a second notice of appeal. The Court of Appeal held that the appeal was a "pending appeal" within s. 22 of the Principal Act, and was in time, although more than a year had elapsed since judgment had been signed against the appellant.

"After the expiration of 21 days." The meaning of the Rule is, that notice of the appeal must be served by the appellant on the respondent within the 21 days. It is no excuse for not serving the notice of appeal that the offices of the Supreme Court are closed while the 21 days are running. If the appellant waits till after the 21 days have expired for the opening of the offices, and does not serve the notice of appeal till then, his appeal will be dismissed.*

"The said respective periods shall be calculated from the time," &c. The reason for the distinction here made, was lucidly explained by Mellish, L.J., in *Swindell v. The Birmingham Syndicate*, *The Birmingham Syndicate v. Swindell*:†—"When the application is granted, the exact terms of the order may be very material, and therefore, in that case, the party desiring to appeal is to have 21 days for doing so, from the time when he knows, or may know, what the terms of the order are. But where an application is refused, the party who desires to appeal is the one who made the application, and who would have to draw up the order. If he were to have 21 days from the time of entering the order, his right of appeal might, by his own delay, be extended indefinitely."

"From the time at which the order is signed." The present Rule, taken in conjunction with Rule 9 of this Order, *supra*, prolongs the time for appealing from a decision or order of the Chief Judge in Bankruptcy. The appeal may now be brought within 21 days from the signing of the order appealed from.‡ Under Rule 143 of the Bankruptcy Rules, 1870, if more than 21 days had elapsed from the day on which the Chief Judge pronounced his decision, the appeal was too late.

"In the case of a refusal, from the date of such refusal." Where an interlocutory application is refused, no order being made except that the costs of the application shall be costs in the cause, the 21 days within which, by the present Rule, the appeal from the refusal of the application must be brought, run from the date of such refusal, and not from the date of entering the order as to costs.§

Where there are several applications made by one summons, and some are granted and some refused, and the refusal alone is appealed against, the 21 days run from the date of the refusal.||

An interlocutory application on summons to vary the Chief Clerk's certificate was heard by Hall, V.C., at the same time as the further con-

* *Ex parte Saffery*, *In Re Lambert*, 5 Ch. D., 365; 36 L. T., 532; 25 W. R. 572.

† 3 Ch. D., 127; 45 L. J. (Ch.), 756; 35 L. T., 111; 24 W. R., 911; 25 W. R., 364.

‡ *In Re Lewer*, *Ex parte Garrard*, 5 Ch. D., 61; 46 L. J. (Bkcy.), 70.

§ *Swindell v. The Birmingham Syndicate*, *The Birmingham Syndicate v. Swindell*, 3 Ch. D., 127; 45 L. J. (Ch.), 756; 35 L. T., 111; 24 W. R., 911.

|| *Traill v. Jackson*, 4 Ch. D., 7; 46 L. J. (Ch.), 16; 25 W. R., 36.

sideration of the cause. His lordship refused to vary the Chief Clerk's certificate, and at the same time made a final order in the cause. The refusal to vary and the final order were drawn up as one order; and the defendant appealed from the whole order. The Court of Appeal held that the appeal against the refusal of the interlocutory application was too late, because it was not brought (as required by the present Rule) within 21 days from the refusal, and that the fact of the refusal of the interlocutory application being incorporated with the final order, did not extend the time for appealing from it to one year.*

**Order LVIII.,
Rule 15.**

This decision was followed by the Court of Appeal in *White v. Witt*,† the only difference between the facts of the two cases being, that in the case of *Cummins v. Heron* the Court below refused to vary, while in *White v. Witt*, the Court below varied the Chief Clerk's certificate.

"Such deposit or other security for the costs, as may be directed." The former practice with regard to giving security for costs is thus stated by the Judicature Commissioners:—‡

"In the Court of Chancery no security for the costs of appeal is required beyond a deposit of £20§ with the Registrar, when the petition is for rehearing of a decree or decretal order. Upon interlocutory appeals no deposit is made. In the Courts of Common Law every appellant (in an appeal, technically so called), and every defendant in an action who brings error is required to give substantial bail to pay costs; but a plaintiff who is a plaintiff in error gives no security. In the Courts of Probate and Divorce no security for costs is taken. Appellants from the Court of Admiralty, if resident out of the jurisdiction of the Court, may be required to give bail in £300; if within the jurisdiction, they give no security."

The Judicature Commissioners then recommend that "the right of appeal should, as a general rule, be *conditional on substantial security being given by the appellant for the costs of the appeal*. Inasmuch, however, as there may be cases to which this rule could not be applied without inconvenience or injustice, both *the nature and the amount* of such security, and the regulations according to which it may be required or dispensed with, are subjects which may properly be dealt with by General Orders of the Court."

It will be seen that this recommendation is dealt with in the last clause of the present Rule.

In *The Phosphate Sewage Company v. Hartmont*,|| a bond with sureties was accepted, where security had been ordered to be given.

A deposit of £50 was directed by the Court of Appeal to be made by the plaintiff (appellant), at the instance of the defendant (respondent), and the appeal was stayed until the deposit should have been made, upon an affidavit that the appellant, who was a butler and lodging-house keeper, had

* *Cummins v. Heron*, 4 Ch. D., 787; 36 L. T., 41; 46 L. J. (Ch.), 423.

† 25 W. R., 435; 12 N. C., 61. See the note to Rule 14 of this Order, *supra*.

‡ First Report, p. 23.

§ Order XXXI., Rule 4, of the Consolidated Orders of the Court of Chancery. "This has all been done away with." Per Mellish, L.J., in *Wilson v. Smith*, 24 W. R., 421.

|| 2 Ch. D., 811; 45 L. J. (Ch.), 465; 34 L. T., 154; 24 W. R., 530.

Order LVIII., Rule 15. given a bill of sale of his furniture, and that his debts exceeded the value of his property, the evidence in the case, also, being very voluminous. The Court, however, declined to make any order than that, if the £50 were not deposited by a day named, the appeal should stand, *ipso facto*, dismissed.*

Leave is not necessary to enable a respondent to serve an appellant with notice of motion that the appellant be directed to give security for costs under this Rule. The motion ought to be set down for the usual day for interlocutory appeal motions, so as to come on before the appeal.†

The Court of Appeal will not entertain an application that the appellant be directed to give security for the costs of the appeal already incurred by the respondent. The application must be made before the costs have been incurred. Neither will the Court entertain an application that the appellant be directed to give security for future costs when it is uncertain whether any will be incurred.‡

The appellant must, *within a reasonable time*, comply with the order requiring him to give security for the costs of the appeal, although no limit of time, within which the security is to be completed, is named in the order:—"Where the appellant had allowed, in one case *nine*,§ in another *four*|| months to elapse without his taking any steps to complete the security, it was held that this reasonable time had been exceeded, and the appeal was in each case dismissed for want of prosecution."

"Special circumstances." The poverty of the appellant and the voluminous nature of the evidence constitute such "special circumstances" under this Rule, as will justify the Court of Appeal in requiring the appellant to give security for costs.¶

So does the fact that the appellants are a *société anonyme*, carrying on business in Paris, and having no assets in England.**

On an appeal from the Admiralty Division, in an Admiralty action *in rem*, the Court of Appeal will not require the appellant to give security for the costs of appeal, except under "special circumstances."††

Rule 16.

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any Judge thereof, or

* *Wilson v. Smith*, 2 Ch. D., 67; 34 L. T., 471; 45 L. J. (Ch), 692; 24 W. R., 421.

† *Grills v. Dillon*, 2 Ch. D., 325; 24 W. R., 431.

‡ *Grant v. The Banque Franco-Egyptienne*, 1 C. P. D., 143; 34 L. T., 470; 24 W. R., 338.

§ *Judd v. James*, 4 Ch. D., 784; 46 L. J. (Ch.), 257; 35 L. T., 873.

|| *Vale v. Oppert*, 25 W. R., 610; W. N., 1877, p. 127.

¶ *Wilson v. Smith*, 2 Ch. D., 67; 34 L. T., 471; 45 L. J. (Ch.), 692; 24 W. R., 421.

** W. N., 1877, p. 137.

†† *The "Victoria,"* 1 P. D., 280; 34 L. T., 931; 24 W. R., 596. The ship in this case had been released on the execution by the appellant of a bail bond not covering the costs of appeal. *The "Helène,"* Br. and Lush., 415.

the Court of Appeal, may so order ; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct. Order LVIII.,
Rule 16

This Rule is a re-enactment of Rule 58 of the Principal Act.

Compare Order LIV., Rule 5, *supra*.

On the subject-matter of this Rule the Judicature Commissioners* observe:—"In the Court of Chancery and the Probate Court an appeal does not operate as a stay of execution, unless the Court, upon special application, so directs.† In the Courts of Common Law appeal or error operates always as a stay of execution, as soon as security is given.‡ In the Court of Admiralty an appeal is followed, of course, by an inhibition, which has the same effect."§ The Commissioners then recommend, that "an appeal shall not operate as a stay of execution or of proceedings under the order appealed from, unless the Court or a Judge of the Court from which the appeal is brought, or the Court of Appeal, shall so order. But such stay of execution should be granted, as of course, when the order under appeal is for a money payment, on the terms of payment of the money into Court, or of security being given to the satisfaction of the Court."

It will be seen that the first sentence of the present Rule is copied *verbatim* from the recommendation of the Judicature Commissioners.

This Rule only applies to appeals from the High Court to the Court of Appeal; not to appeals from the Court of Appeal to the House of Lords.||

An application to the Court appealed from for a stay of execution, under this Rule, pending appeal, cannot be made *ex parte*. The most obvious reason for not granting the application would be, that the security offered for costs is not sufficient in its quality or amount; and of that the respondent is the best judge. He ought, therefore, to receive notice of the application, in order that he may have an opportunity of coming before the Court and objecting.¶

The Exchequer Division refused to order that an appeal from their decision should operate as a stay of proceedings, until the appellant should have given notice of appeal to the other side. "Otherwise," said Pollock, B., "you might make your appeal depend on our granting a stay of execution."**

When an application is made to stay proceedings, pending appeal, and the application is granted, the applicant will be put under terms.††

In an action brought on a bought note, proceedings were stayed by Lindley, J., at chambers, pending an appeal, and his lordship declined to order the money in dispute to be paid into Court by the appellant.‡‡

* First Report, pp. 23, 24.

† Order XXXI., Rule 2, of the Consolidated Orders of the Court of Chancery.

‡ Common Law Procedure Act, 1854, s. 38; Common Law Procedure Act, 1860, s. 18.

§ Rules for Admiralty Appeals, Rule 4.

|| *Justice v. The Mersey Steel and Iron Company*, 1 C. P. D., 575; 24 W. R., 955; 2 Charley's Cases (Court), 142.

¶ *The Republic of Peru v. Weguelin*, 24 W. R., 297.

** *Earp v. Faulkner*, 1 Charley's Cases (Court), 179.

†† 1 Charley's Cases (Chambers), 129. Per Quain, J.

‡‡ *Southwell v. Rowditch*, 2 Charley's Cases (Chambers), 69.

Order LVIII,
Rule 16.
In an action against a corporation, a demurrer to the jurisdiction having been overruled, a stay of proceedings, pending appeal, was ordered by Archibald, J., at chambers; but his lordship declined to order security to be given by the appellant.*

Rule 17.

Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal, or to a Judge of the Court below or of the Court of Appeal, it shall be made in the first instance to the Court or Judge below.

See s. 50 of the Principal Act, *supra*, and Order LXI., Rule 6, *infra*.

Such an application to the Court of Appeal is not an appeal, but an original motion.†

Rule 18.

Every application to a Judge of the Court of Appeal shall be by motion, and the provisions of Order LIII. shall apply thereto.

“A Judge.” Interlocutory motions have hitherto been made before “not less than *two* Judges” of the Court of Appeal, sitting together in open Court, pursuant to s. 12 of the present Act, *supra*.

A Judge of the Court of Appeal may reverse an order made by a Vacation Judge. Order XLI., Rule 6.

Rule 19.†

In order to constitute Divisional Courts for the determination of appeals from Inferior Courts under section 45 of the Judicature Act, 1873, each Division of the High Court of Justice shall, before the 1st of January, 1876, select one of the Judges of such Division to act until the 1st of January, 1877, and so on before every 1st of January subsequent to the 1st of January, 1876, to act for the twelve months next ensuing.

Any two or more of the Judges so selected shall constitute a Divisional Court for the purpose of the said section.

Any other Judge of the High Court of Justice may, by arrangement between himself and any one of the Judges so selected, act for such last-mentioned Judge in any particular case or cases, or on any particular day or days.

The Judges so selected shall make such arrangements as they shall think fit as to the manner in which application may be made to them, or any of them,

* *Grant v. The Banque Franco-Egyptienne*, 2 Charley's Cases (Chambers), 70.

† *Cooper v. Cooper*, 2 Ch. D., 492; 45 L. J. (Ch.), 667; 24 W.R., 628.

‡ Rules 19 and 19a deal with a totally different class of appeals from the previous Rules of this Order. § *Sic*.

i Court or chambers, under the 6th section of 38 & 39 Vict. c. 50, relative to appeals by motion under that Act. Order LVIII.,
Rule 19.

This new Rule was added by Rule 16 of the Rules of the Supreme Court, December, 1875, and remained in force till December, 1876, when it was annulled, and Rule 19a was substituted for it.

This Rule and the next were framed under the powers conferred by s. 45 of the Principal Act. "Appeals from any Inferior Court may be heard by Divisional Courts of the High Court, consisting respectively of such of the judges thereof as may, from time to time, be assigned for that purpose, pursuant to Rules of Court." The reader is referred to the note to s. 45 of the Principal Act, *supra*.

In *Williams v. Bindon*,* decided on the 13th of January, 1876, Malins, V.C., said that Quain, J., was wrong in directing (on November 25th, 1875), cause to be shewn, in *Amies v. Clarke*,† at chambers, against reversing the order of the County Court Judge, under s. 6 of the County Courts Act, 1875,‡ shewing cause in such a case not being one of the matters to be transacted at chambers.

The Judge at chambers, under s. 6 of the County Courts Act, 1875, cannot even make an order to shew cause, "if the Divisional Court be then sitting," though not then sitting to hear motions on appeal from County Courts.§

In *Amies v. Clarke*,|| Quain, J., on cause being shown before him at chambers, followed the new practice of the Court of Appeal by giving the successful appellant the costs of the appeal. Where the Judge at chambers grants a rule *nisi ex parte* on appeal from a County Court, when a Divisional Court of Appeal from Inferior Courts is sitting, and therefore without jurisdiction, the Divisional Court has no power to give costs to the party who appears to shew cause before it against the Judge's order.¶

Rule 19a.

Rule 16 of the Rules of the Supreme Court, December, 1875, is hereby repealed, and instead thereof the following provision shall take effect:—

Every Judge of the High Court of Justice for the time being shall be a Judge** to hear and determine appeals from Inferior Courts, under section 45 of the Supreme Court of Judicature Act, 1873. All such appeals (except Admiralty appeals from Inferior Courts, which, until further order, shall be assigned, as heretofore, to the

* W. N., 1876, p. 16.

† 1 Charley's Cases (Chambers), 21, cited *supra*, in the note to s. 45 of the Principal Act.

‡ 38 and 39 Vict. c. 50.

§ *Brown v. Shaw*, 1 Ex. D., 425.

|| 1 Charley's Cases (Chambers), 22, 23.

¶ *Brown v. Shaw*, 1 Ex. D., 425.

** See *Clarke v. Roche*, 35 L. T., 705.

Order LVIII,
Rule 19a.

present Judge of the Admiralty Court), shall be entered in one list by the officers of the Crown Office of the Queen's Bench Division; and shall be heard by such Divisional Court of the Queen's Bench, Common Pleas, or Exchequer Division, as the Presidents of those Divisions shall from time to time direct.

Nothing in this Order shall affect the validity of any Rule or Regulation heretofore issued with reference to such appeals by the Divisional Court formed under the said section.

This new Rule was added by Rule 11 of the Rules of the Supreme Court, December, 1876.

See the note to s. 45 of the Principal Act, *supra*.

"Except Admiralty appeals from Inferior Courts." This is in affirmation of the decision of Sir Robert Phillimore, in *The "Two Brothers,"** that his jurisdiction as the Court of Appeal from the County Courts in Admiralty Cases is preserved intact by ss. 34 and 42 of the Principal Act.

As to the constitution of a "Divisional Court of Queen's Bench, Common Pleas, and Exchequer Divisions," see s. 41 of the Principal Act, *supra*.

It is apprehended that the Divisional Courts formed under this Rule fall within the exceptions to single-Judge jurisdiction, referred to in s. 17 of the Appellate Jurisdiction Act, 1876:—"Provided, nevertheless, that Divisional Courts of the High Court of Justice may be held for the transaction of any business, which may, for the time being, be ordered by Rules of Court to be heard by a Divisional Court;" and that, therefore, "any such Divisional Court, when held, shall," *prima facie*, "be constituted of two Judges of the Court, and no more." Under [the repealed] Rule 19 of this Order, indeed, any two of the selected Judges constituted a Divisional Court for the purposes of s. 45 of the Principal Act.

As a rule, a Divisional Court of Appeal from Inferior Courts will hear only one Counsel on each side.† If the case, however, is of sufficient magnitude, two Counsel on each side will be heard.‡

ORDER LIX.

EFFECT OF NON-COMPLIANCE.

Non-compliance with any of these Rules shall not render

* 1 P. D., 52; 45 L. J. (P. D. and A.), 47; 33 L. T., 792; 24 W. R., 112; 1 Charley's Cases (Court), 45.

† *Hawes v. Peake*, 33 L. T., 818; 24 W. R., 407.

‡ *Le Blanch v. Reuter's Telegram Company*, 1 Ex. D., 408; 34 L. T., 691.

the proceedings in any action void unless the Court or a Judge shall so direct; but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit. Order LIX.

This Rule embodies an important saving principle often acted upon by the Court of Chancery. Thus, an order which is not in compliance with the Chancery Orders cannot be treated as a nullity: it must be properly discharged.*

By Order III., Rule 5, of the Consolidated Orders of the Court of Chancery, a party suing in person must indorse his name and residence and address for service upon every writ which he shall sue out. Where a plaintiff neglected to indorse his address for service on a writ of *subpoena* under the old Chancery practice, from the decision in the case of *Price v. Webb*† it would appear that the writ was not void, but that the Court would so deal with the proceedings by staying process or otherwise, as to give the defendant the benefit of the Rule.‡

Very full powers of amendment of the pleadings are given by Order XXVII., *supra*; and of the writ by Rule 6 of the Rules of the Supreme Court, February, 1876.

Irregularity was generally visited, both at law and in equity, with costs.

As to the waiver of irregularity at Common Law under the old practice, see *Beresford v. Geddes*,§ and *Oulton v. Ratcliffe*.||

Where the plaintiff, on the 20th of December, gave notice of motion for December 22nd, being the day after the termination of the Michaelmas sittings, and the notice was held bad, because it was given for an "impossible day," and also because it did not comply with Order LIII., Rule 4, which requires "two clear days" notice of motion to be given, the Exchequer Division declined to "amend" the "irregularity," under the powers conferred upon the Court by this Rule, on the ground that to do so would be to usurp the functions of the Legislature.¶

In *Rolfe v. Maclaren*,** the plaintiff, instead of replying specifically to the defendant's counterclaim, pursuant to Rule 20 of Order XIX., replied by joining issue generally. Hall, V.C., refused, however, to set aside or amend the plaintiff's reply under the present Rule, as being a "non-compliance with these Rules."

* *Wilkins v. Stevens*, 10 Sim., 617; *Blake v. Blake*, 7 Beav., 514; *Flemings v. Humphery*, 4 Beav., 1.

† 2 Hare, 511, 513.

‡ Morgan and Chute's Chancery Acts and Orders, pp. 388, 395.

§ L. R., 2 C. P., 185.

|| L. R., 9 C. P., 189.

¶ *Daubeny v. Shuttleworth*, 1 Ex. D., 53; 45 L. J. (Ex.), 177; 34 L. T., 357; 24 W. R., 321.

** 3 Ch. D., 106; 24 W. R., 816. The only effect of the plaintiff's joining issue generally on the defendant's counterclaim was the admission by the plaintiff of the facts alleged in it. Order XIX., Rule 17.

Order LX.,
Rule 1.

ORDER LX.

OFFICERS.

Rule 1.

All officers, who, at the time of the commencement of the said Act, shall be attached to the Court of Chancery, shall be attached to the Chancery Division of the said High Court; and all officers, who, at the time of the commencement of the said Act, shall be attached to the Court of Queen's Bench, shall be attached to the Queen's Bench Division of the said High Court; and all officers, who, at the time of the commencement of the said Act, shall be attached to the Court of Common Pleas, shall be attached to the Common Pleas Division of the said High Court; and all officers, who, at the time of the commencement of the said Act, shall be attached to the Court of Exchequer, shall be attached to the Exchequer Division of the said High Court; and all officers, who, at the time of the commencement of the said Act, shall be attached to the Court of Probate, the Court of Divorce, and the Court of Admiralty respectively, shall be attached to the Probate, Divorce, and Admiralty Division of the said High Court.

The words "and the London Court of Bankruptcy" were struck out in Committee, after "Court of Exchequer," by the Attorney-General.

This is one of the transition Rules of this Schedule.

See, as to the subject matter of this Rule, Part V. of the Principal Act, "Officers and Offices" (Sections 77 to 87 inclusive), and the notes thereto; sections 14, 27, 28, 34 and 35 of the present Act; and sections 16, 21 and 23 of the Appellate Jurisdiction Act, 1876.

As to the definition of the "proper officer," see Order LXIII., *infra*.

Rule 2.

Officers attached to any Division shall follow the appeals from the same Division, and shall perform in the Court of Appeal analogous duties in reference to such appeals as the Registrars and officers of the Court of Chancery usually performed as to re-hearings in the Court of Appeal in Chancery, and as the Masters and officers of

the Courts of Queen's Bench, Common Pleas, and Exchequer respectively performed as to appeals heard by the Court of Exchequer Chamber. Order LX.,
Rule 2.

For examples of the duties performed by Registrars on rehearings, see Order XXXI., Rules 4 and 5, of the Consolidated Orders of the Court of Chancery; by the Masters in proceedings in error, the Common Law Procedure Act, 1852, ss. 149, 158.

Affidavits intended to be used on appeal should be filed with the officer of the Division of the High Court from which the appeal comes.* Thus, on an appeal from the Probate Division the officer of the Probate Division must take charge of these affidavits.†

The present holder of the office of Registrar of Her Majesty in Ecclesiastical and Admiralty Causes‡ is to be deemed an officer of the Supreme Court in respect of any appeals in which he would otherwise be concerned coming within the cognisance of the Court of Appeal.§

By s. 77 of the Principal Act|| all the duties with respect to appeals from the Court of Chancery of the County Palatine of Lancaster, which were, at the commencement of the Supreme Court of Judicature Acts, performed by the Clerk of the Council of the Duchy of Lancaster, were to cease to be performed by him, and were to be performed by Registrars, Taxing Masters, and other officers, by whom like duties are performed in the Supreme Court. The duty of attending upon the Court of Appeal during the hearing of appeals from the Court of Chancery of the County Palatine of Lancaster now devolves upon the Chancery Registrar of the day.

The duty of entering appeals from Inferior Courts in one list for the new Divisional Courts of Appeal from Inferior Courts now devolves, under Order LVIII., Rule 19a, upon "the officers of the Crown Office of the Queen's Bench Division." ◆

ORDER LXI.¶

SITTINGS AND VACATIONS.

Rule 1.

The sittings of the Court of Appeal and the sittings in London and Middlesex of the High Court of Justice shall be four in every year, viz., the Michaelmas Sittings, the Hilary Sittings, the Easter Sittings, and the Trinity Sittings.

The Michaelmas Sittings shall commence on the 2nd of November and terminate on the 21st of December; the

* *Watts v. Watts*, 45 L. J. (Ch.), 658; 24 W. R., 623; *Times*, Wednesday, March 29th, 1876.

† *Watts v. Watts*, *ubi supra*.

‡ Mr. Rothery.

§ S. 8 of this Act, *supra*.

|| See the note to that section, *supra*.

¶ This Order should be read in connection with ss. 26-30 of the Principal Act, *supra*.

Order LXXI.,
Rule 1.

Hilary Sittings shall commence on the 11th of January, and terminate on the Wednesday before Easter; the Easter Sittings shall commence on the Tuesday after Easter week and terminate on the Friday before Whit Sunday; the Trinity Sittings shall commence on the Tuesday after Whitsun week and terminate on the 8th of August.

It will be observed that the Michaelmas "Sittings" commence on the same day as the former Michaelmas "Term," and the Hilary "Sittings" on the same day as the former Hilary "Term."

It will be also noticed that the "sittings" extend in length far beyond the former "terms,"* and include the periods usually appropriated to the Assizes.

If a party names in his notice of motion a day for the hearing which must fall within a period when there are no sittings, the notice is a bad notice. If the party served with the notice, waiving the irregularity of the notice, appears to show cause against it, he will not be entitled to any costs of his so appearing.†

Rule 2.

The Vacations to be observed in the several Courts and offices of the Supreme Court shall be four in every year, viz., the Long Vacation, the Christmas Vacation, the Easter Vacation, and the Whitsun Vacation.

The Long Vacation shall commence on the 10th of August and terminate on the 24th of October. The Christmas Vacation shall commence on the 24th of December and terminate on the 6th of January. The Easter Vacation shall commence on Good Friday and terminate on Easter Tuesday; and the Whitsun Vacation shall commence on the Saturday before Whit Sunday and shall terminate on the Tuesday after Whit Sunday.

As to the power of the Queen in Council to regulate Vacations by Orders in Council, see s. 27 of the Principal Act.

This Rule is partly taken from Rule 4 of Order V. of the Consolidated Orders of the Court of Chancery.

The alterations are as follows:—The Long Vacation is to end on the 24th of October instead of the 28th. The 24th of October is the recog-

* Terms are abolished by s. 26 of the Principal Act, but only "so far as relates to the administration of justice."

† *Daubney v. Shuttleworth*, 1 Ex. D., 53; 45 L. J. (Ex.), 177; 34 L. T., 308; 24 W.R., 321.

nized day for the termination of the Long Vacation at Common Law. By the 2 Wm. IV. c. 39, s. 11, "No declaration or pleading after declaration shall be filed or delivered between the 10th of August and the 24th of October."*

Order LXL,
Rule 2.

The Easter Vacation is to commence on Good Friday and end on Easter Tuesday, instead of "the days" being left to the Lord Chancellor "every year specially to direct."

The Whitsun Vacation is defined, in the new phraseology, to commence on "the Saturday before Whit Sunday," instead of "the third day after Easter term," and to terminate on "the Tuesday after Whit Sunday" instead of "the second day before Trinity term."

Although not expressly made in pursuance of s. 27 of the Principal Act, this Rule practically carries out the objects which the framers of that section had in view.

"The Long Vacation." By Order LVII., Rule 4, "no pleadings shall be amended or delivered in the Long Vacation, unless directed by the Court or a Judge." By Rule 5 of the same Order, "the time of the Long Vacation shall not be reckoned in the computation of the times appointed or allowed by these Rules for *filing, amending or delivering any pleading*, unless otherwise directed by the Court or a Judge."

The time of the Long Vacation counts, however, in respect of proceedings other than the filing, amending or delivering of pleadings. For example, the time of the Long Vacation is strictly reckoned in the computation of the time—eight days—appointed or allowed by Order LIV., Rule 6, for appealing from a decision at the Judges' chambers in the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice.†

Rule 3.

The days of the commencement and termination of each sitting and vacation shall be included in such sitting and vacation respectively.

This Rule is copied *verbatim* from subsection (5) of the 4th Rule of the Vth Order of the Consolidated Orders of the Court of Chancery.

Rule 4.

The several offices of the Supreme Court shall be open on every day of the year, except Sundays, Good Friday, Monday and Tuesday in Easter week, Whit Monday, Christmas Day, and the next following working day, and all days appointed by proclamation to be observed as days of general fast, humiliation, or thanksgiving.

This Rule is copied *verbatim* from Rule 1 of the Vth Order of the Consolidated Orders of the Court of Chancery, with the addition of the words

* See also Reg. Gen. Hil. T., 1853, Rule 173.

† *Crom v. Samuels*, 2 C. P. D., 21; 46 L. J., C. P., 1; 35 L. T., 423; 25 W. R., 45.

**Order LXI.
Rule 4.**

"and the next following working day" after "Christmas Day." This appears to be a concession to the somewhat more liberal arrangements for holidays at the Masters' Offices. Reg. Gen. Hil. T., 1853, Rule 173, following 3 and 4 Wm. IV. c. 42, s. 43, provides that the Masters' Offices shall be closed on "Christmas Day and the three following days." The Masters' Offices were also closed on Easter Eve, and on Whit Tuesday (if it did not fall in term time).*

By Order LVII., Rule 2, "where any limited time *less than six days* from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time." Where the limited time is more than six days, Sunday, Christmas Day, and Good Friday are counted. Thus, where a bankruptcy appeal under Rules 9 and 15 of Order LVIII. was brought within twenty-two days, counting Sundays, it was held to be too late.†

By Rule 3 of the same Order, where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices are next open.‡ The fact of the offices being closed will not, however, exonerate an appellant from the ceremony of serving notice of appeal on the respondent during the time that the offices are closed, and if the twenty-one days within which the appeal must be brought expire while the offices are so closed without notice of appeal having been so served, the appeal will be too late.§

Rule 4a.

The offices of each District Registrar of the High Court of Justice shall be open on every day and hour in the year on which the offices of the Registrar of the County Court of the place in which the District Registry is situate are required to be kept open.

¶ This new Rule was added by Rule 15 of the Rules of the Supreme Court, December, 1875.

The reason of the assimilation of the hours of opening and closing of the District Registrars' Offices with the hours of opening and of closing of the County Court Registrars' Offices is that, except in Lancashire and Durham, the offices are identical.

* Reg. Gen. Hil. T., 6 Wm. IV., and Reg. Gen. Hil. T., 1853, Rule 73. † See notes to Order LVII., *supra*.

‡ See *Taylor v. Jones*, 1 C. P. D., 87; 45 L. J., C. P., 110; 34 L. T., 131.

§ *Ex parte Saffery, In re Lambert*, 5 Ch. D., 365; 46 L. J. (Bank), 70; 36 L. T., 532; 25 W. R., 572. See, also, *Ex parte Viney, In re Gilbert*, 4 Ch. D., 794; 46 L. J. (Bank), 80; 36 L. T., 43.

Rule 4b.

Order LXL,
Rule 4b.

The offices of the Supreme Court (including the Judges' chambers) shall close on Saturdays at 2 o'clock.

This new Rule was added by Rule 9 of the Rules of the Supreme Court, February, 1876.

The object of the Rule is to extend the advantages of the Saturday half-holiday to the officers of the Supreme Court.

Rule 5.

Two of the Judges of the High Court shall be selected at the commencement of each Long Vacation for the hearing in London or Middlesex during Vacation of all such applications as may require to be immediately or promptly heard; such two Judges shall act as Vacation Judges for one year from their appointment. In the absence of arrangement between the Judges, the two Vacation Judges shall be the two Judges last appointed (whether as Judges of the said High Court or of any Court whose jurisdiction is by the said Act transferred to the said High Court) who have not already served as Vacation Judges of any such Court; and if there shall not be two Judges for the time being of the said High Court who shall not have so served, then the two Vacation Judges shall be the Judge (if any) who has not so served, and the senior Judge or Judges who has or have so served once only, according to seniority of appointment, whether in the said High Court or such other Court as aforesaid. The Lord Chancellor shall not be liable to serve as a Vacation Judge.

This Rule and the next are the "provisions made" under s. 28 of the Principal Act for the hearing in London and Middlesex, during Vacation, of all such applications *as may require to be immediately or promptly heard*.

These Rules are founded on the previous practice of the Master of the Rolls and the Vice-Chancellors, who, by an excellent arrangement amongst themselves, took duty each for one year, according to a recognized *rota*, as "Vacation Judge."* The duties of "Vacation Judge" commenced immediately on the rising of the Courts for the Long Vacation,† although

* See Daniel's Chancery Practice, pp. 849 and 1067.

† *Francis v. Browne*, 8 Jur., N.S., 785; *Re Bank of Hindustan*, 16 L.T., N.S. 700; *Allen v. Hicks*, W. N. (1870), 218.

**Order LXI.,
Rule 6.**

they might have risen before the time fixed for the commencement of the Vacation. Contrary to the usual practice at other times the "Vacation Judge" was expressly empowered to transact business belonging to another Judge.* A similar *rota* existed at Common Law.

Inconvenience has arisen from the Vacation Judge at chambers being also one of the two Vacation Judges for the Divisional Court, as the appeal from the Judge at chambers would lie, if at all, to himself and his colleague.†

Rule 6.

The Vacation Judges may sit either separately, or together as a Divisional Court, as occasion shall require, and may hear and dispose of all actions, matters, and other business to whichever Division the same may be assigned. No order made by a Vacation Judge shall be reversed or varied except by a Divisional Court or the Court of Appeal, or a Judge thereof, or the Judge who made the order. Any other Judge of the High Court may sit in Vacation for any Vacation Judge.

This Rule provides, so to speak, a *new* Divisional Court for the convenience of suitors.

Two Rules, which followed this one, were struck out in Committee on the motion of the Attorney-General. They provided for one of the Ordinary Judges of the Court of Appeal sitting as a Vacation Judge, in addition to the two Vacation Judges selected from the Judges of the High Court of Justice. The omission of these Rules was necessitated by the reduction in the number of "Ordinary" Judges of the Court of Appeal from 7‡ to 3.§

Rule 7.

The Vacation Judges of the High Court may dispose of all actions, matters, and other business of an urgent nature during any interval between the Sittings of any Division of the High Court to which such business may be assigned, although such interval may not be called or known as a "Vacation."

* Order VI., Rule 11, and Order XXXV., Rule 59, of the Consolidated Orders of the Court of Chancery.

† See *Crom v. Samuels*, 2 C. P. D., 21; 46 L. J. (C.P.), 1; 35 L. T., 423; 25 W. R., 45.

‡ See section 6 of the Principal Act, *supra*.

§ See section 4 of this Act, *supra*. The number of Ordinary Judges of the Court of Appeal has now been raised to six by s. 15 of the Appellate Jurisdiction Act, 1876.

This is in accordance with the previous practice of the Court of Chancery, as stated in the note to Rule 5 of this Order, *supra*. Order LXL,
Rule 7.

Rule 8.

The Official Referees shall sit at least from 10 a.m. to 4 p.m. on every day during the Michaelmas, Hilary, Easter, and Trinity Sittings of the High Court of Justice, except on Saturdays, during such Sittings, when they shall sit, at least, from 10 a.m. to 2 p.m.; but nothing in this Rule shall prevent their sitting on any other days.

This new Rule was added by Rule 10 of the Rules of the Supreme Court, February, 1876.

As to the Official Referees, see ss. 56 to 59 and s. 83 of the Principal Act; Order XXXVI., Rules 29b to 34, and the new Order, as to the mode of payment of Official Referees.

As to the Saturday half-holiday, see Rule 4b of this Order, *supra*.

ORDER LXII.

EXCEPTIONS FROM THE RULES.

Nothing in these Rules shall affect the Practice or Procedure in any of the following causes or matters:—

Criminal proceedings:

Proceedings on the Crown side of the Queen's Bench Division:

Proceedings on the Revenue side of the Exchequer Division:

Proceedings for Divorce or other Matrimonial Causes.

The exceptions, it is to be noted, are only exceptions from the Rules of the present *Schedule*, not from the rest of the Supreme Court of Judicature Acts, 1873 and 1875, and these Rules may be abrogated under s. 17 of the Appellate Jurisdiction Act, 1876.

"Criminal proceedings." By s. 19 of the Principal Act, *supra*, "the Court of Appeal shall have power to hear and determine appeals from any judgment or order, *save as hereinafter mentioned*, of Her Majesty's High Court of Justice."

By s. 34 of the Principal Act, *supra*, criminal matters which would have been within the exclusive jurisdiction of the Court of Queen's Bench in the exercise of its *original* jurisdiction, if this Act had not passed, are assigned to the Queen's Bench Division of the High Court.

By sec. 47 of the Principal Act, *supra*, "no appeal shall lie from any judgment of the High Court in any criminal cause or matter, *save for some error of law apparent upon the record*, as to which no question shall have been reserved for the consideration of the Judges under the 11 and 12 Vict. c. 78."

Order LXII. By s. 19 of this Act, *supra*, the Practice and Procedure in criminal causes are to remain the same as before the commencement of the Act, "subject to the first Schedule and any Rules of Court to be made under this Act."

The words "save as hereinafter mentioned" in the passage cited from s. 19 of the Principal Act, point, more particularly, to the passage cited from s. 47 of the same Act.

In view of these enactments and of the present Order, the Court of Appeal has decided that no appeal lies from a decision of the Queen's Bench Division discharging a rule to review the taxation of the defendant's costs by the Master under the 6 and 7 Vict. c. 98, s. 8, on the trial of a criminal information for libel, in which a verdict of "not guilty" has been found.*

In view of the same enactments, the Court of Appeal has also decided that no appeal lies from a decision of the Queen's Bench Division, discharging a rule for a *certiorari* to bring up a summary conviction under the 1 and 2 Wm. IV. c. 32, s. 30, for trespass by day in pursuit of game, for the purpose of quashing it for want of jurisdiction.†

"Proceedings on the Crown Side of the Queen's Bench Division." These words were put in for the sake of caution. Per Brett, L.J., in *Regina v. Fletcher*.‡ Mellish, L.J., however, in that case, said: "I wish to guard against being understood to say that all matters on the Crown side of the Queen's Bench Division come under the words of the section providing that 'no appeal shall lie in a criminal cause or matter.'"[§]

"Proceedings on the Revenue Side of the Exchequer Division." "The jurisdiction of the Court of Exchequer as a Court of Revenue" was by s. 16 of the Principal Act transferred to the High Court of Justice; and by s. 34 of the same Act "all causes and matters which would have been within the exclusive jurisdiction of the Court of Exchequer as a Court of Revenue" were assigned to the Exchequer Division of the High Court.

By s. 97 of the same Act, nothing in that Act is to affect the office of the Receipt of the Exchequer (4 and 5 Wm. IV. c. 15).

"Proceedings for Divorce or other Matrimonial Causes." By s. 18 of this Act, the Rules and Orders of Court in force at the time of the commencement of the Act in the Court for Divorce and Matrimonial Causes shall remain in force, except so far as they are expressly varied by the present Schedule, or by Rules of Court made before the commencement of the Act.

ORDER LXIII.

INTERPRETATION OF TERMS.

The provisions of the 100th section of the Act^{||} shall apply to these Rules.

* *Regina v. Steel*, 2 Q. B. D., 37; 46 L. J. (M. C.), 1; 25 W. R., 34; 35 L. T., 534.

† *Regina v. Fletcher*, 2 Q. B. D., 43; 46 L. J. (M. C.), 4; 35 L. T., 538; 25 W. R., 149.

‡ 35 L. T., 538.

§ *Regina v. Fletcher*, 25 W.

|| *I.e.*, of the Principal Act.

In the construction of these Rules, unless there is any- Order LXIII.
 g in the subject or context repugnant thereto, the
 al words hereinafter mentioned or referred to shall
 or include the meanings following :

“ Person ” shall include a body corporate or politic.

“ Probate actions ” shall include actions and other
 matters relating to the grant or recall of probate or
 of letters of administration other than common form
 business.

“ Proper officer ” shall, unless and until any Rule
 to the contrary is made, mean an officer to be ascer-
 tained as follows :—

(a.) Where any duty to be discharged under the
 Act or these Rules is a duty which has heretofore been
 discharged by any officer, such officer shall continue
 to be the proper officer to discharge the same.

(b.) Where any new duty is under the Act or these
 Rules to be discharged, the proper officer to discharge
 the same shall be such officer, having previously dis-
 charged analogous duties, as may from time to time
 be directed to discharge the same, in the case of an
 officer of the Supreme Court, or the High Court of
 Justice, or the Court of Appeal, not attached to any
 Division, by the Lord Chancellor, and in the case of
 an officer attached to any Division, by the President of
 the Division, and in the case of an officer attached to
 any Judge, by such Judge.

“ THE ACT ” and “ THE SAID ACT,” shall respec-
 tively mean THE SUPREME COURT OF JUDICATURE
 ACT, 1873, AS AMENDED BY THIS ACT.

As to the “ proper officer,” see Order V., Rules 4 and 9; Order VI.,
 1; Order VIII., Rule 1; Order XII., Rule 6a; Order XXX.,
 2; Order XXXVI., Rule 24; Order XLI., Rules 1 and 3; Order
 , Rule 9, &c. See also Part V. of the Principal Act, “ Officers and
 ”

APPENDIX (A).

PART I.

FORMS OF WRITS OF SUMMONS, &c.*

No. 1.

187 . [*Here put the letter and number.*]
 In the High Court of Justice. Between *A.B.* Plaintiff,
 Division. and
C.D. and *E.F.* Defendants.

VICTORIA, by the Grace of God, &c.

To *C.D.*, of in the county of and *E.F.*, of

We command you, That within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Division of our High Court of Justice in an action at the suit of *A.B.*; and take notice, that in

* The learning upon this subject under the old law will be found in Day's Common Law Procedure Acts, Lush's Practice of the Superior Courts of Law at Westminster, and Archbold's Practice.

Any costs occasioned by the use of more prolix or *other* forms of writs are to be borne by the party using them, "unless the Court shall otherwise direct." Order II., Rule 2, *supra*.

This Form illustrates Order II., Rule 3, *supra*.

"Witness, &c." After a sharp controversy, it has been authoritatively decided that a writ of summons must be tested in the following form:—"Witness Hugh McCalmont, Baron Cairns, Lord High Chancellor of Great Britain, at Westminster, the day of in the year of our Lord, One thousand eight hundred and seventy ." See Order II., Rule 8.

"N.B." This "N.B." is misleading. It should run thus:—"This writ is to be served within (twelve) calendar months from the date thereof, or, if renewed, [WITHIN SIX CALENDAR MONTHS] from the date of such renewal, including the day of such date, and not afterwards." See Order VIII., Rule 1.

"The defendant may appear hereto by entering an appearance, either personally or by solicitor, at the [] Office at ."
 If the writ is issued from the Chancery Division, the blank must be filled up thus: "at the Record and Writ Clerk's Office, Chancery Lane, in the County of Middlesex;" if from the Queen's Bench Division, thus:—"at the Appearance Office, Queen's Bench Division, Temple, London;" if from the Common Pleas Division, thus:—"at the Offices of the Common Pleas Division of the High Court of Justice, Serjeant's Inn, Chancery Lane, London;" if from the Exchequer Division, thus:—"at the Offices of the Exchequer Division of the High Court of Justice, No. 7, Stone Buildings, Lincoln's Inn, in the County of Middlesex."

"The said plaintiff, who resides at." By Order IV., Rule 1, "the solicitor of a plaintiff suing by solicitor shall indorse upon every writ of

default of your so doing, the plaintiff may proceed therein, and judgment may be given in your absence. WITNESS, &c.

Appendix
P. I., No. 1.

Memorandum to be subscribed on the writ.

N.B.—This writ is to be served within (TWELVE) calendar months from the date thereof, or, if renewed, from the date of such renewal including the day of such date, and not afterwards.

The defendant [*or defendants*] may appear hereto by entering an appearance [*or appearances*] either personally or by solicitor at the [] office at .

Indorsements to be made on the writ before issue thereof.

The plaintiff's claim is for, &c.

This writ was issued by E.F., of [] solicitor for the said plaintiff, WHO RESIDES AT [] , or, this writ was issued by the plaintiff in person who resides at [mention the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any].

Indorsement to be made on the writ after service thereof.

This writ was served by X.Y. on L.M. [the defendant or one of the defendants], on Monday, the [] day of [], 18 [].

(Signed) X.Y.

summons the address of the plaintiff." This is a new provision, which must be attended to.

"The plaintiff's claim is," &c. Where the writ of summons is to be "*specially* indorsed with the particulars of the amount sought to be recovered," pursuant to Order III., Rule 6, the *special* indorsement must come after the words, "The plaintiff's claim is," &c., (indorsement of claim, see Order III., Rule 1; App. (A), Part II., section 2), being introduced by the words, "THE FOLLOWING ARE THE PARTICULARS" (App. (A), Part II., section VII.)

"Wherever the plaintiff's claim is for a debt or liquidated demand only, the indorsement of claim (and the *special* indorsement of particulars, if any,) must be followed by the subjoined notice:—"And £ [] for costs; and if the amount claimed be paid to the plaintiff, or his solicitor, within four days from the service hereof, further proceedings will be stayed."

If interest is claimed, the following form should be added after this notice:—"The plaintiff also claims interest on £ [] of the above sum from the date of the writ until payment or judgment."

The form of writ or summons given above contains no intimation as to the "ADDRESS FOR SERVICE," which must be added if the solicitor's "place of business" "shall be more than three miles from Temple Bar." Order IV., Rule 1. The words, "The address for service is []," should precede the words "This writ was served by me." If the solicitor is agent for another solicitor, he must add after his own name and address "Agent for [], of []." Order IV., Rule 1.

It is a convenient practice for the person serving the writ to add after the date of service, "Indorsed the [] day of [], 187 []."

The form of a writ of summons under the Bills of Exchange Act, 1855, is prescribed by the Schedule to that Act, which will be found in the

No. 2.

Appendix A,
P. I., No. 2.

WRIT FOR SERVICE OUT OF THE JURISDICTION, OR WHERE NOTICE IN LIEU OF SERVICE IS TO BE GIVEN OUT OF THE JURISDICTION.*

187 . [*Here put the letter and number.*]

In the High Court of Justice.
Division.

Between *A.B.* Plaintiff,
and
C.D. and E.F. Defendants.

VICTORIA, by the grace of God, &c.

To *C.D.*, of

We command you, *C.D.*, 'That within [*here insert the number of days DIRECTED BY THE COURT OR JUDGE ordering the service or notice*] after the service of this writ [*or notice of this writ as the case may be*] on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Division of Our High Court of Justice in an action at the suit of *A.B.*; and take notice, that in default of your so doing, the plaintiff may, *by leave of the Court or a Judge*, PROCEED therein, and judgment may be given in your absence. Witness, &c.

Memoranda and Indorsements as in Form No. 1.

Indorsement to be made on the writ before the issue thereof.

N.B.—*This writ is to be used where the Defendant or all the Defendants, or one or more Defendant or Defendants, is or are out of the jurisdiction.*

note to Order II., Rule 6, *supra*. The form must, however, be adapted to the new procedure, wherever it differs from the procedure under the Bills of Exchange Act. The address of the plaintiff, and the address for service of the plaintiff's solicitor must, *e.g.*, be added to the indorsements on the writ, under Order IV., Rule 1.

When the action is commenced in a District Registry, the writ of summons must contain the name of the District Registry. Order V., Rule 8a (Rule 3 of the Rules of the Supreme Court, June, 1876). The name, "District Registry," is usually added after the name of the Division of the High Court. Notice should be given that an appearance may be entered "at the District Registry Office of the High Court of Justice situate at" It is also necessary for the plaintiff's solicitor, whose place of business is not within the District, under the new Rule 3a of Order IV. (Rule 3 of the Rules of the Supreme Court, February, 1876), to add, "The address for service WITHIN THE DISTRICT is"

As to the form of writ of summons under the Bills of Exchange Act, 1855, where the action is commenced in a District Registry, see the note to Order II., Rule 6, where a form is set out. *Oger v. Bradnum*, 1 C. P. D., 334; 45 L. J. (C. P.), 273; 34 L. T., 578; 24 W. R., 404; 1 Charley's Cases (Court), 132.

* This form illustrates Order II., Rule 5, *supra*. As to leave to serve this writ, see Order II., Rule 4, and Order XI, Rule 1, *supra*, and the notes thereto. As to directing a time for appearance, see Order XI., Rule 4, *supra*.

"Service or notice." This writ is to be served out of the jurisdiction on a British subject resident abroad; notice of the writ, and not the writ itself, is to be served on a foreign person resident abroad. "Person" includes "corporate body." See *Meek v. Michaelson*, W. N., 1876, p.

No. 3.

Appendix A,
P. I., No. 3.

NOTICE OF WRIT IN LIEU OF SERVICE TO BE GIVEN OUT OF THE
JURISDICTION.*

187 . [*Here put the letter and number.*]

Between *A.B.* Plaintiff,

and

C.D., E.F., and G.H. Defendants.

To *G.H.*, of

Take notice, that *A.B.*, of

has commenced an action

111; 2 Charley's Cases (Court), 178; ss. 18 and 19 of the Common Law Procedure Act, 1852; Order XI., Rule 3, and Order LXIII., definition of "person."

"Victoria, by the grace of God, &c." In *Bacon v. Turner*, (*Times*, May 4th, 1876,) Counsel for the plaintiff, when applying to Hall, V.C., for leave, under Order II., Rule 4, *supra*, to issue a writ of summons for service out of the jurisdiction, asked at the same time for directions as to whether the words "Empress of India" should be inserted after the initial words of the writ, "Victoria by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith." The Vice-Chancellor referred him, first, to the Record and Writ Clerks, and on their stating that they had no power to alter the form of the writ without the direction of the Court, referred him, secondly, to the Lord Chancellor.

"By leave of the Court or a Judge." These words crept in by mistake, owing to this form being copied from Form 3 in Schedule (A) to the Common Law Procedure Act, 1852. That form was prescribed by s. 18 of the Common Law Procedure Act, 1852, under which, while no leave was necessary to enable a plaintiff to *issue* a writ of summons for service out of the jurisdiction, leave was necessary to enable him "*to proceed.*" By Order II., Rule 4, *supra*, leave must be obtained to *issue* a writ of summons for service out of the jurisdiction, and, consequently, no subsequent leave is necessary to enable the plaintiff to "*proceed.*" The words were decided in *Scott v. The Royal Wax Candle Company*, 1 Q. B. D., 404; 45 L. J. (Q. B.), 586; 34 L. T., 683; 24 W. R., 668; 2 Charley's Cases (Court), 179, and *Bacon v. Turner*, 1 Ch. D., 275; 34 L. T., 349; 24 W. R., 637; 2 Charley's Cases (Court), 185, to be surplusage and misleading, and were struck out of the form by Rule 2 of the Rules of the Supreme Court, June, 1876 (Order II., Rule 3a).

"Memoranda and indorsements as in Form No. 1." In addition to these memoranda and indorsements, the following notice should be indorsed on this writ:—"N.B. Take notice that if the defendant served with this writ do not appear according to the exigency thereof, the plaintiff will be at liberty to sign final judgment for any sum not exceeding the sum above claimed, with interest at the rate specified and the sum of £ , or such other sum as may be allowed on taxation for costs, and issue execution for the same."

* This notice illustrates Order II., Rule 5, *supra*. As to leave to proceed, see Order II., Rule 3a, and the note to Form No. 2, *supra*. The writ itself, and not notice of it, must be served on an Englishwoman married to a foreigner and residing with him abroad. *Bacon v. Turner*, 1 Ch. D., 275; 34 L. T., 349; 24 W. R., 637; 2 Charley's Cases (Court), 184.

**Appendix A,
F. I., No. 3.**

against you, *G.H.*, in the Division of Her Majesty's High Court of Justice in England, by writ of that Court, dated the day of , A.D. 18 ; which writ is indorsed as follows [*copy in full the indorsements*], and you are required within days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said Court to the said action; and in default of your so doing, the said *A.B.* may, *by leave of the Court or a Judge*, proceed therein, and judgment may be given in your absence.

You may appear to the said writ by entering an appearance personally or by your solicitor at the [] office at

(Signed) *A.B.* of &c.

or

X.Y. of &c.

Solicitor for *A.B.*

In the High Court of Justice,
Division.

No. 4.

WRIT IN ADMIRALTY ACTION *in rem*.*

187 . [*Here put the letter and number.*]

In the High Court of Justice.

Admiralty Division.

Between *A.B.*, plaintiff,

and

Owners.

Victoria, &c.

To the owners and parties interested in the ship or vessel [*Mary*] [or cargo, &c., as the case may be] of the port of

We hereby authorise officer of our Supreme Court, and all and singular his substitutes to arrest the ship or vessel [*Mary*], of the port of and the cargo laden therein [or cargo, &c., as the case may be], and to keep the same under safe arrest until he shall receive further orders from Us. And We command you, the owners and other parties interested in the said ship and cargo [or cargo, &c., as the case may be] that within

* This form illustrates Order II., Rule 7, *supra*.

The form was annulled by Rule 2 of the Rules of the Supreme Court, December, 1875, Order II, Rule 7a, *supra*, and the Forms (A) and (B) in the Appendix to those Rules were substituted for it. The writ of summons was thus broken up into its component parts, a writ of summons, properly so called, and a warrant of arrest. See the notes to Order II., Rules 7 and 7a, and to Order V. Rules 11 11a, and 11b, *supra*.

eight days after the arrest of the said vessel [or cargo, &c., as the case may be] you do cause an appearance to be entered for you in the Admiralty Division of Our High Court of Justice in an action at the suit of A.B.; and take notice that, in default of your so doing, Our said Court will proceed to hear the said action and to pronounce judgment therein, your absence notwithstanding.

**Appendix A,
P. I., No. 4.**

No. 4a.

WRIT OF SUMMONS IN ADMIRALTY ACTION *in rem*.*

187 [Here put the letter and number.]

In the High Court of Justice,
Admiralty Division.

Between A.B., plaintiff,
and

The owners of the
Victoria, by the grace of God, &c.

To the owners and parties interested in the ship or vessel
of the port of [or cargo, &c., as the case may be].

We command you, that within eight days after the service of this writ, inclusive of the day of such service, you do cause an appearance to be entered for you in the Admiralty Division of our High Court of Justice in an action at the suit of A.B.; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, this day of 18 .

* This new form was substituted by Rule 2 of the Rules of Supreme Court, December, 1875 (Order II., Rule 7a.), for the latter part of Form 4 of Part I. of this Appendix, prescribed by Order II., Rule 7, *supra*. It is an assimilation, *mutatis mutandis*, of the writ of summons in an Admiralty action *in rem* to the writ of summons in an ordinary action. See the next form for the new form of warrant of arrest. A warrant of arrest formed part of the writ of summons prescribed by Order II., Rule 7. See Form 4, *supra*. See also the notes to Order II., Rules 7 and 7a, and to Order V., Rules 11, 11a, and 11b, *supra*. Forms of Indorsement of Claim suited to this writ will be found in Part II., section VI., *infra*.

"Or cargo, as the case may be." If the action is brought for the ship, cargo and freight, these words should be added here:—"And the cargo now or lately laden therein, together with the freight due for the transportation thereof."

After the word "renewed," insert "within six calendar months."

The "address for service" (Order IV., Rule 1), should be indorsed before the words, "This writ was served by."

Appendix A,
P. I., No. 4a.*Memorandum to be subscribed on the Writ.*

N.B.—This writ is to be served within (*twelve*) calendar months from the date thereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

The (defendant or defendants) may appear hereto by entering an appearance (or appearances) either personally or by solicitor at the [] office at

Indorsements to be made on the Writ before Issue thereof.

The plaintiff's claim is for, &c.

This writ was issued by E.F., of , solicitor for the said plaintiff, who resides at , or, this writ was issued by the plaintiff in person, who resides at [mention the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any.]

Indorsement to be made on the Writ after Service thereof.

This writ was served by X.Y. [here state the mode in which the service was effected, whether on the owner, or on the ship, cargo, or freight, according to Order IX., Rules 10, 11, and 12, as the case may be] on the day of 18 .

Signed,
X.Y.

No. 4b.

WARRANT OF ARREST IN ADMIRALTY ACTION *in rem*.*

187 [Here put the letter and number.]

In the High Court of Justice,
Admiralty Division.

Between A.B., plaintiff,
and
The owners of the

Victoria, &c.

To the Marshal of the Admiralty Division of our High Court of Justice, and to all and singular his substitutes. We hereby command you to arrest the ship or vessel of the port of [and the cargo and freight, &c., as the case may be], and to keep the same under safe arrest until you shall receive further orders from Us. Witness, Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, this day of 18 .

* This new form was substituted by Rule 3 of the Rules of the Supreme Court, December, 1875, Order V., Rule 11a, for the earlier part of the writ of summons prescribed by Order II., Rule 7, *supra*. This new form was itself annulled by Rule 4 of the Rules of the Supreme Court, February, 1876 (Order V., Rule 11b).

No. 4 c.

*Warrant of Arrest in Admiralty Action in rem.**

187 [Here put the letter and number.

Appendix A.
P. I., No. 4 c.

In the High Court of Justice,
Admiralty Division.

Between *A.B.*, plaintiff,
and
the Owners of the
Victoria, &c.

To the Marshal of the Admiralty Division of Our High Court of Justice, and to all and singular his substitutes [or To the Collector or Collectors of Customs at the Port of]. We hereby command you to arrest the ship or vessel of the port of [and the cargo and freight, &c., as the case may be,] and to keep the same under safe arrest, until you shall receive further orders from Us. Witness, Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, this day of 18 .

No. 5.

Form of Memorandum for Renewed Writ.†

In the High Court of Justice.
Division.

Between *A.B.*, plaintiff,
and
C.D., defendant.

Seal renewed writ of summons in this action indorsed as follows:—
[Copy original writ and the indorsements.]

* This new form was substituted for the form appended to the Rules of the Supreme Court, December, 1875, by Rule 4 of the Rules of the Supreme Court, February, 1876. The only alteration is the insertion of the additional words, ["or to the Collector or Collectors of Customs at the port of]." See the notes to Order II., Rules 7, 7a, 11a, and to Order V., Rules 11 and 16, *supra*.

"And the cargo and freight, &c., as the case may be." If the action is brought for ship's cargo and freight, the following words should be here inserted. "And the cargo now or lately laden therein, together with the freight due for the transportation thereof." After the *teste* of the warrant, should be added:—"This warrant was taken out by ;" and on the back of the warrant should be indorsed a memorandum of the arrest, thus:—"On the day of 187 , the within named ship or vessel lying at was arrested by affixing this original warrant for a short time on the mainmast of the vessel, and, on taking off the process, by leaving a copy thereof fixed in its place. Indorsed by me this day of 187 ." See Order IX., Rule 10a, *supra*.

† This form illustrates Order VIII., Rule 1, *supra*.

The writ of summons can only be renewed for six months, not for twelve months, as might be implied from the "N.B." to Form No. 1, *supra*. See the note to that form.

**Appendix A,
P. L., No. 6.**

No. 6.

Memorandum of Appearance.*187 . [*Here put the letter and number.*]

High Court of Justice.

[*Chancery*] Division.*A.B., v. C.D., and others.*ENTER an appearance for
in this action.

Dated this day of

X.Y.,

Solicitor for the defendant.

The place of business of *X.Y.* is

His ADDRESS FOR SERVICE is

or [*C.D.,*

Defendant in person.

The address of *C.D.* is

His address for service is

.]

The said DEFENDANT [REQUIRES, or, DOES NOT REQUIRE] A STATEMENT OF
COMPLAINT to be filed and delivered.

No. 7.†

[*Here put the letter and number.*]

In the High Court of Justice.

Queen's Bench (or Chancery, C. P., or, &c.) Division.

Between *A.B.*, plaintiff,

and

C.D., and*E.F.*, defendants.The defendant, *C.D.*, limits his defence to part only of the property

* This is the form prescribed by Order XII., Rule 10, *supra*. As to the requirement of a statement of claim (or of complaint), see Order XIX., Rule 2; Order XXI., Rule 1; and Order XXII., Rule 2, *supra*.

This memorandum must be dated on the day of delivering it, Order XII., Rule 6a (Rule 5 of the Rules of the Supreme Court, February, 1876).

Notice of the appearance must be given, if the defendant appears "elsewhere than where the writ is issued," Order XII., Rule 6a. The insertion of the "Address for service" is important, as by Order XII., Rule 9, "if the memorandum does not contain such address, it shall not be received."

"Filed and." In actions in the Common Law Divisions these words may be omitted, as insensible.

† This is the form prescribed by Order XII., Rule 22, *supra*.

This notice must be served within four days after appearance. The defendant will be deemed to defend for the whole of the land, if his defence is not expressly limited either by this kind of notice, or in the Memorandum of Appearance itself. Order XII., Rule 21.

mentioned in the writ in this action, that is to say, to the close called [“the Big Field.”] Appendix A,
P. I., No. 7.

Yours, &c.,

G.H.,

Solicitor for the said defendant, C.D.

To Mr. X.Y., plaintiff's solicitor.

PART II.

SECTION I.*

GENERAL INDORSEMENTS IN MATTERS ASSIGNED BY THE 34TH SECTION OF THE ACT TO THE CHANCERY DIVISION.

1. *Creditor to administer Estate.*

The plaintiff's claim is as a creditor of X.Y., of deceased, to have the [real and] personal estate of the said X.Y. administered. The defendant C.D., is sued as the administrator of the said X.Y. [and the defendants E.F. and G.H. as his co-heirs-at-law].

2. *Legatee to administer Estate.*

The plaintiff's claim is as a legatee under the will dated the day of 18, of X.Y. deceased, to have the [real and] personal estate of the said X.Y. administered. The defendant C.D. is sued as the executor of the said X.Y. [and the defendants E.F. and G.H. as his devisees].

3. *Partnership.*

The plaintiff's claim is to have an account taken of the partnership

* Sections I. to VI. deal with “General Indorsements” in the Chancery, Common Law, Probate, and Admiralty Divisions: Section VII., with Special Indorsements, and Section VIII. with Indorsements of the Character of the Parties.

The 34th section of the Principal Act assigns to the Chancery Division of the High Court all causes and matters pending in the Court of Chancery at the commencement of the Act; all causes and matters to be commenced after the commencement of the Act under any Act of Parliament by which exclusive jurisdiction in respect to such causes or matters has been given to the Court of Chancery or to any Judges or Judge thereof respectively, except appeals from County Courts; and all causes and matters for any of the following purposes:—The administration of the estates of deceased persons; the dissolution of partnerships, or the taking of partnership or other accounts; the redemption or foreclosure of mortgages, the raising of portions or other charges on land; the sale and distribution of the proceeds of property subject to any lien or charge; the execution of trusts, charitable or private; the rectification or setting aside or cancellation of deeds and other written instruments; the specific performance of contracts between vendors and purchases of real estates including contracts for leases; the partition or sale of real estates; the wardship of infants and the care of infants' estates. It will be perceived that the forms of indorsements are not intended to be an exhaustive list, but merely specimens, several of the items of the above list of subjects receiving no illustrations whatever from these forms. Where “none of these forms are applicable,” “such other similarly concise forms, as the nature of the case may require,” may be used (Order II., Rule 3, *supra*).

Appendix A,
P. II., s. 1.

dealings between the plaintiff and defendant [under articles of partnership dated the day of], and to have the affairs of the partnership wound up.

4. By Mortgagee.

The plaintiff's claim is to have an account taken of what is due to him for principal, interest, and costs on a mortgage dated the day of , made between [or by deposit of *title deeds*], and that the mortgage may be enforced by foreclosure or sale.

5. By Mortgagor.

The plaintiff's claim is to have an account taken of what, if anything, is due on a mortgage dated and made between [parties], and to redeem the property comprised therein.

6. Raising Portions.

The plaintiff's claim is that a sum of £., which by an indenture of settlement dated , was provided for the portions of the younger children of may be raised.

7. Execution of Trusts.

The plaintiff's claim is to have the trusts of an indenture dated , and made between , carried into execution.

8. Cancellation or Rectification.

The plaintiff's claim is to have a deed dated , and made between [parties], set aside or rectified.

9. Specific Performance.

The plaintiff's claim is for specific performance of an agreement dated the day of , for the sale by the plaintiff to the defendant of certain [*freehold*] hereditaments at .*

SECTION II.

**MONEY CLAIMS, WHERE NO SPECIAL INDORSEMENT UNDER ORDER III.,
RULE 6.†**

Goods sold. The plaintiff's claim is £. for the price of goods sold.

[*This form shall suffice whether the claim be in respect of goods sold and delivered, or of goods bargained and sold.*]

* These forms are intended to illustrate Order III., Rule 3, *supra*. See also Order II., Rules 1 and 2; and Order III., Rule 2, *supra*. Any costs occasioned by the use of any more prolix or other forms of indorsements of claim, are to be borne by the party using them, "unless the Court shall otherwise direct," Order II., Rule 2. As to the indorsement of claim for account, see Order III., Rule 8.

† "Money claims" are here contrasted with claims for damages, for the recovery of land, for mesne profits, for rent, for dower, in replevin, &c. (see sec. IV, *infra*), where a debt or liquidated demand in money is *not* claimed. "Money claims" are equivalent to "debts or liquidated demands in money." For forms of "special indorsements" of "money claims," see sec. VII., *infra*. The present section, like the last, is confined to "General Indorsements."

| | | |
|---|---|---------------------------------|
| The plaintiff's claim is | l. for money lent [<i>and interest</i>]. | Money lent. |
| The plaintiff's claim is of goods sold, and | l., whereof l. is for the price of money lent, and l. for interest. | Several demands. |
| The plaintiff's claim is | l. for arrears of rent. | Rent. |
| The plaintiff's claim is [<i>or as the case may be</i>]. | l. for arrears of salary as a clerk | Salary, &c. |
| The plaintiff's claim is | l. for interest upon money lent. | Interest. |
| The plaintiff's claim is bution. | l. for a general average contri- | General average. |
| The plaintiff's claim is | l. for freight and demurrage. | Freight, &c. |
| The plaintiff's claim is | l. for lighterage. | . |
| The plaintiff's claim is | l. for market tolls and stallage. | Tolls. |
| The plaintiff's claim is [. . .]. | l. for penalties under the statute | Penalties. |
| The plaintiff's claim is defendant as a banker. | l. for money deposited with the | Banker's balance. |
| The plaintiff's claim is money expended] as a solicitor. | l. for fees for work done [<i>and</i> ., | Fees, &c., as solicitors. |
| The plaintiff's claim is character, as auctioneer, cotton broker, &c.] | l. for commission earned as [<i>state</i> | Commission. |
| The plaintiff's claim is | l. for medical attendances. | Medical attendance, &c. |
| The plaintiff's claim is upon policies of insurance. | l. for a return of premiums paid | Return of premium. |
| The plaintiff's claim is | l. for the warehousing of goods. | Warehouse rent, |
| The plaintiff's claim is railway. | l. for the carriage of goods by | Carriage of goods. |
| The plaintiff's claim is house. | l. for the use and occupation of a | Use and occupation of houses. |
| The plaintiff's claim is | l. for the hire of [<i>furniture</i>]. | Hire of goods. |
| The plaintiff's claim is | l. for work done as a surveyor. | Work done. |
| The plaintiff's claim is | l. for board and lodging. | Board and lodging. |
| The plaintiff's claim is tuition of X. Y. | l. for the board, lodging, and | Schooling. |
| The plaintiff's claim is defendant as solicitor [<i>or factor, or collector, or, &c.</i>] of the plaintiff. | l. for money received by the de- | Money received. |
| The plaintiff's claim is dant under colour of the office of | l. for fees received by the defen- | Fees of office. |
| The plaintiff's claim is charged for the carriage of goods by railway. | l. for a return of money over- | Money overpaid. |
| The plaintiff's claim is by the defendant as | l. for a return of fees overcharged | |
| The plaintiff's claim is with the defendant as stakeholder. | l. for a return of money deposited | Return of money by stakeholder. |

Appendix A,
P. II., s. 2.

| | | |
|--|--------------------------|--|
| Money won from stakeholder. | The plaintiff's claim is | 1. for money entrusted to the defendant as stakeholder, and become payable to plaintiff. |
| Money entrusted to agent. | The plaintiff's claim is | 1. for a return of money entrusted to the defendant as agent of the plaintiff. |
| Money obtained by fraud. | The plaintiff's claim is | 1. for a return of money obtained from the plaintiff by fraud. |
| Money paid by mistake. | The plaintiff's claim is | 1. for a return of money paid to the defendant by mistake. |
| Money paid for consideration which has failed. | The plaintiff's claim is | 1. for a return of money paid to the defendant for [<i>work to be done, left undone ; or, a bill to be taken up, not taken up ; or, &c.</i>] |
| | The plaintiff's claim is | 1. for a return of money paid as a deposit upon shares to be allotted. |
| Money paid by surety for defendant. | The plaintiff's claim is | 1. for money paid for the defendant as his surety. |
| Rent paid. | The plaintiff's claim is | 1. for money paid for rent due by the defendant. |
| Money paid on accommodation bill. | The plaintiff's claim is | 1. upon a bill of exchange accepted [<i>or indorsed</i>] for the defendant's accommodation. |
| Contribution by surety. | The plaintiff's claim is | 1. for a contribution in respect of money paid by the plaintiff as surety. |
| By co-debtor. | The plaintiff's claim is | 1. for a contribution in respect of a joint debt of the plaintiff and the defendant, paid by the plaintiff. |
| Money paid for calls. | The plaintiff's claim is | 1. for money paid for calls upon shares, against which the defendant was bound to indemnify the plaintiff. |
| Money payable under award. | The plaintiff's claim is | 1. for money payable under an award. |
| Life policy. | The plaintiff's claim is | 1. upon a policy of insurance upon the life of X. Y., deceased. |
| Money bond. | The plaintiff's claim is | 1. upon a bond to secure payment of £1,000, and interest. |
| Foreign Judgment. | The plaintiff's claim is | 1. upon a judgment of the Court, in the Empire of Russia. |
| Bills of exchange, &c. | The plaintiff's claim is | 1. upon a cheque drawn by the defendant. |
| | The plaintiff's claim is | 1. upon a bill of exchange accepted [<i>or drawn or indorsed</i>] by the defendant. |
| | The plaintiff's claim is | 1. upon a promissory note made [<i>or indorsed</i>] by the defendant. |
| | The plaintiff's claim is | 1. against the defendant A. B. as acceptor, and against the defendant C. D. as drawer [<i>or indorser</i>] of a bill of exchange. |

The plaintiff's claim is l. against the defendant as surety Surety.
for the price of goods sold.

Appendix A,
P. II., s. 2.

The plaintiff's claim is l. against the defendant A.B. as principal, and against the defendant C.D. as surety, for the price of goods sold [or arrears of rent, or for money lent, or for money received by the defendant A. B. as traveller for the plaintiff, or, &c.].

The plaintiff's claim is l. against the defendant as a *del Del credere*
credere agent for the price of goods sold [or as losses under a ^{agent.}
policy].

The plaintiff's claim is l. for calls upon shares. Calls

The plaintiff's claim is l. for crops, tillage, manure [or Waygoing
as the case may be] left by the defendant as outgoing tenant of crops, &c.
a farm.*

SECTION III.

Indorsement for Costs, &c.† [add to the above Forms].‡

And l. for costs; and if the amount claimed be paid to the plaintiff or his solicitor within four days [or if the writ is to be served out of the jurisdiction, or notice in lieu of service allowed, insert the time for appearance limited by the order §] from the service hereof, further proceedings will be stayed.

SECTION IV.

DAMAGES AND OTHER CLAIMS.||

The plaintiff's claim is for damages for breach of a contract to Agent, &c. employ the plaintiff as traveller.

* These forms are intended to illustrate Order III., Rule 3. See also Order II., Rules 1 and 2; Order III., Rule 2, *supra*. Any costs occasioned by the use of any more prolix or other forms of indorsements of claim are to be borne by the party using them, "unless the Court shall otherwise direct." Order II., Rule 2. By the Rules of the Supreme Courts (Costs), Order VII., Rule 1.—solicitors are to charge fees on the "Lower Scale" in all actions to which any of the forms of indorsement of claims in the present section, or other similar forms, are applicable. Fees on the "Higher Scale" may, however, in such actions be allowed to solicitors by the Court or a Judge (Rule 3).

† This form, which is copied from s. 8. of the Common Law Procedure Act, 1852, is prescribed by Order III., Rule 7, *supra*.

‡ The indorsement is not necessary in cases falling under section IV. "The above forms" mean the forms contained in section II. only.

§ This has reference to Order XI., Rule 4, *supra*. See the forms of writs for service out of the jurisdiction, Part I., Nos. 2 and 3, *supra*.

|| This section gives specimens of indorsements in actions in the Common Law Divisions, in which the plaintiff does *not* claim a debt or liquidated demand in money, and to which section III., *supra*, is *not* applicable. The present section is confined to "general" indorsements. There can be no "special" indorsements of the claims contained in this section. See Order II., Rule 6.

**Appendix A,
P. I., No. 4a.**

Memorandum to be subscribed on the Writ.

N.B.—This writ is to be served within (*twelve*) calendar months from the date thereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

The (defendant or defendants) may appear hereto by entering an appearance (or appearances) either personally or by solicitor at the [] office at

Indorsements to be made on the Writ before Issue thereof.

The plaintiff's claim is for, &c.

This writ was issued by E.F., of [], solicitor for the said plaintiff, who resides at [], or, this writ was issued by the plaintiff in person, who resides at [mention the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any.]

Indorsement to be made on the Writ after Service thereof.

This writ was served by X.Y. [*here state the mode in which the service was effected, whether on the owner, or on the ship, cargo, or freight, according to Order IX., Rules 10, 11, and 12, as the case may be*] on the day of 18 .

Signed,
X.Y.

No. 4b.

WARRANT OF ARREST IN ADMIRALTY ACTION *in rem*.*

187 [Here put the letter and number.]

In the High Court of Justice,
Admiralty Division.

Between A.B., plaintiff,
and

The owners of the

Victoria, &c.

To the Marshal of the Admiralty Division of our High Court of Justice, and to all and singular his substitutes. We hereby command you to arrest the ship or vessel [] of the port of [and the cargo and freight, &c., as the case may be], and to keep the same under safe arrest until you shall receive further orders from Us. Witness, Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, this day of 18 .

* This new form was substituted by Rule 3 of the Rules of the Supreme Court, December, 1875, Order V., Rule 11a, for the earlier part of the writ of summons prescribed by Order II., Rule 7, *supra*. This new form was itself annulled by Rule 4 of the Rules of the Supreme Court, February, 1876 (Order V., Rule 11b).

No. 4 c.

*Warrant of Arrest in Admiralty Action in rem.**

187 [Here put the letter and number.

Appendix A.
P. I., No. 4 c.

In the High Court of Justice,
Admiralty Division.

Between *A.B.*, plaintiff,
and
the Owners of the
Victoria, &c.

To the Marshal of the Admiralty Division of Our High Court of Justice, and to all and singular his substitutes [or To the Collector or Collectors of Customs at the Port of]. We hereby command you to arrest the ship or vessel of the port of [and the cargo and freight, &c., as the case may be,] and to keep the same under safe arrest, until you shall receive further orders from Us. Witness, Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, this day of 18 .

No. 5.

Form of Memorandum for Renewed Writ.†

In the High Court of Justice.
Division.

Between *A.B.*, plaintiff,
and
C.D., defendant.

Seal renewed writ of summons in this action indorsed as follows:—
[Copy original writ and the indorsements.]

* This new form was substituted for the form appended to the Rules of the Supreme Court, December, 1875, by Rule 4 of the Rules of the Supreme Court, February, 1876. The only alteration is the insertion of the additional words, [“or to the Collector or Collectors of Customs at the port of].” See the notes to Order II., Rules 7, 7a, 11a, and to Order V., Rules 11 and 16, *supra*.

“And the cargo and freight, &c., as the case may be.” If the action is brought for ship’s cargo and freight, the following words should be here inserted. “And the cargo now or lately laden therein, together with the freight due for the transportation thereof.” After the *teste* of the warrant, should be added:—“This warrant was taken out by ;” and on the back of the warrant should be indorsed a memorandum of the arrest, thus:—“On the day of 187 , the within named ship or vessel lying at was arrested by affixing this original warrant for a short time on the mainmast of the vessel, and, on taking off the process, by leaving a copy thereof fixed in its place. Indorsed by me this day of 187 .” See Order IX., Rule 10a, *supra*.

† This form illustrates Order VIII., Rule 1, *supra*.

The writ of summons can only be renewed for six months, not for twelve months, as might be implied from the “N.B.” to Form No. 1, *supra*. See the note to that form.

Appendix A,
P. II., s. 4.

Landlord and
tenant.

The plaintiff's claim is for damages for breach of contract to keep a house in repair.

The plaintiff's claim is for damages for breaches of covenants contained in a lease of a farm.

Medical man.

The plaintiff's claim is for damages for injury to the plaintiff from the defendant's negligence as a medical man.

Mischievous
Animal.

The plaintiff's claim is for damages for injury by the defendant's dog.

Negligence.

The plaintiff's claim is for damages for injury to the plaintiff [or, if by husband and wife, to the plaintiff, C.D.] by the negligent driving of the defendant or his servants.

The plaintiff's claim is for damages for injury to the plaintiff while a passenger on the defendant's railway by the negligence of the defendant's servants.

The plaintiff's claim is for damages for injury to the plaintiff at the defendant's railway station, from the defective condition of the station.

Lord Camp-
bell's Act.

The plaintiff's claim is as executor of A.B., deceased, for damages for the death of the said A.B., from injuries received while a passenger on the defendant's railway, by the negligence of the defendant's servants.

Promise of
marriage.

The plaintiff's claim is for damages for breach of promise of marriage.

Quare impedit.

The plaintiff's claim is in *quare impedit* for

Seduction.

The plaintiff's claim is for damages for the seduction of the plaintiff's daughter.

Sale of goods.

The plaintiff's claim is for damages for breach of contract to accept and pay for goods.

The plaintiff's claim is for damages for non-delivery [or short delivery or defective quality, or other breach of contract of sale] of cotton [or, &c.].

The plaintiff's claim is for damages for breach of warranty of a horse.

Sale of land.

The plaintiff's claim is for damages for breach of a contract to sell [or purchase] land.

The plaintiff's claim is for damages for breach of a contract to let [or take] a house.

The plaintiff's claim is for damages for breach of a contract to sell [or purchase] the lease, with goodwill, fixtures, and stock in trade of a public-house.

The plaintiff's claim is for damages for breach of covenant for title [or for quiet enjoyment, or, &c.] in a conveyance of land.

The plaintiff's claim is for damages for wrongfully entering the plaintiff's land and drawing water from his well [or cutting his grass, or pulling down his timber, or pulling down his fences, or removing his gate, or using his road or path, or crossing his field, or depositing sand there, or carrying away gravel from thence, or carrying away stones from his river].

Trespass to land.

Appendix A.
F. II., s. 4.

The plaintiff's claim is for damages for wrongfully taking away the support of plaintiff's land [or house, or mine].

The plaintiff's claim is for damages for wrongfully obstructing a way [public highway or a private way].

The plaintiff's claim is for damages for wrongfully diverting [or obstructing, or polluting, or diverting water from] a watercourse. &c.

The plaintiff's claim is for damages for wrongfully discharging water upon the plaintiff's land [or into the plaintiff's mine].

The plaintiff's claim is for damages for wrongfully obstructing the plaintiff's use of a well.

The plaintiff's claim is for damages for the infringement of the plaintiff's right of pasture.

[This form shall be sufficient whatever the nature of the right to pasture be.]

The plaintiff's claim is for damages for obstructing the access of light to plaintiff's house.

The plaintiff's claim is for damages for the infringement of the plaintiff's right of sporting.

The plaintiff's claim is for damages for the infringement of the plaintiff's patent.

The plaintiff's claim is for damages for the infringement of the plaintiff's copyright.

The plaintiff's claim is for damages for wrongfully using [or imitating] the plaintiff's trade mark.

The plaintiff's claim is for damages for breach of a contract to build a ship [or to repair a house, &c.].

The plaintiff's claim is for damages for breach of a contract to employ the plaintiff to build a ship, &c.

The plaintiff's claim is for damages to his house, trees, crops, &c., caused by noxious vapours from the defendant's factory [or, &c.].

The plaintiff's claim is for damages from nuisances by noise from the defendant's works [or stables, or, &c.].

The plaintiff's claim is for damages for loss of the plaintiff's goods in the defendant's inn.

Add to Indorsement:

**Appendix A, Mandamus.
P. II., s. 4.**

| | |
|---------------------|--|
| | And for a mandamus. |
| | Add to Indorsement : |
| Injunction. | And for an injunction. |
| | <i>Add to Indorsement where claim is to land or to establish title, or both.</i> |
| Mesne profits. | And for mesne profits. |
| Arrears of rent | And for an account of rents or arrears of rent. |
| Breach of covenant. | And for breach of covenant for [repairs].* |

SECTION V.

PROBATE.†

1. By an executor or legatee propounding a will in solemn form.

The plaintiff claims to be executor of the last will, dated the day of , of C.W., late of gentleman, deceased, who died on the day of and to have the said will established. This writ is issued against you as one of the next of kin of the said deceased [or as the case may be].

2. By an executor or legatee of a former will, or a next of kin, &c., of the deceased, seeking to obtain the revocation of a probate granted in common form.

The plaintiff claims to be executor of the last will, dated the day of of C.D., late of gentleman, deceased, who died on the day of and to have the probate of a pretended will of the said deceased, dated the day of , revoked. This writ is issued against you as the executor of the said pretended will [or as the case may be].

3. By an executor or legatee of a will when letters of administration have been granted as in an intestacy.

The plaintiff claims to be the executor of the last will of C.D., late of gentleman, deceased, who died on the day of dated the day of

The plaintiff claims that the grant of letters of administration of the personal estate of the said deceased obtained by you should be revoked, and probate of the said will granted to him.

4. By a person claiming a grant of administration as a next of kin of the deceased, but whose interest as next of kin is disputed.

* These forms are intended to illustrate Order III., Rule 3, *supra*. See also Order II., Rules 1 and 2; and Order 3, Rule 3, *supra*. Any costs occasioned by the use of more prolix or other forms of indorsement of claim are to be borne by the party using them, "unless the Court shall otherwise direct." Order II., Rule 2. By the Rules of the Supreme Court (Costs, Order VI., Rule 1), solicitors are to charge fees on the "*Lower Scale*," in all actions in which any of the forms of indorsement of claims in the present section are applicable. See, however, Rule 3 of that Order.

† "Probate actions" include actions and other matters relating to the grant or recall of probate or of letters of administration, other than common form business.

The plaintiff claims to be the brother and sole next of kin of *C.D.*, of Appendix A,
P. II., s. 5.
 , gentleman, deceased, who died on the day
 of , intestate, and to have as such a grant of administration to the personal estate of the said intestate. This writ is issued against you because you have entered a caveat, and have alleged that you are the sole next of kin of the deceased [*or as the case may be*].*

(*g.*†) SECTION VI.

ADMIRALTY.‡

1. *Damage to vessel by collision.*

The plaintiffs, as owners of the vessel "*Mary*," of the port of claim 1,000*l.* against the brig or vessel "*Jane*," for damage occasioned by a collision which took place in the North Sea in the month of May last.

2. *Damage to cargo by collision.*

The plaintiffs, as owners of the cargo laden on board the vessel "*Mary*," of the port of , claim *l.* against the vessel "*Jane*," for damage done to the said cargo in a collision in the North Sea in the month of May last.

[*The two previous forms may be combined.*]

3. *Damage to cargo otherwise.*

The plaintiff, as owner of goods laden on board the vessel "*Mary*," on a voyage from Lisbon to England, claims from the owner of the said vessel *l.*, for damage done to the said goods during such voyage.

* 4. *In causes of possession.*

The plaintiff, as sole owner of the vessel "*Mary*," of the port of , claims to have possession decreed to him of the said vessel.

5. The plaintiff claims possession of the vessel "*Mary*," of the port of , as owner of 48-64th shares of the said vessel against *C.D.* owner of 16-64th shares of the said vessel.

6. The plaintiff, as part owner of the vessel "*Mary*," claims against *C.D.*, part owner, and his shares in the said vessel *l.*, as part of the earnings of the said vessel due to plaintiff.

7. The plaintiff, as owner of 48-64th shares of the vessel "*Mary*," of the port of , claims possession of the said brig as against *C.D.*, the master thereof.

8. The plaintiff, under a mortgage, dated the day of

* These forms are intended to illustrate Order III., Rule 3, *supra*. The indorsements must "shew whether the plaintiff claims as creditor, executor, administrator, residuary legatee, legatee, next of kin, heir-at-law, devisee, or in any or what other character;" Order III., Rule 5.

† The "*(g)*" appears to be a typographical error.

‡ These forms are intended to illustrate Order III., Rule 3, *supra*. See the new form of the writ of summons in an Admiralty action *in rem*, Form 4a of Part I. of this Appendix, and Order II., Rule 3a.

Appendix A,
P. II., s. 6.

claims against the vessel "Mary," £., being the amount of his mortgage thereon, and £. for interest.

9. The plaintiff, as assignee of a bottomry bond, dated the day of _____, and granted by C. D., as master of the vessel "Mary," of the port of _____, to A. B., at St. Thomas's, in the West Indies, claims £. against the vessel "Mary," and the cargo laden thereon.

10. *By a part owner of a vessel.*

The plaintiff, as owner of 24-64th shares of the vessel "Mary," being dissatisfied with the management of the said vessel by his co-owners, claims that his co-owners shall give him a bond in £., for the value of the plaintiff's said shares in the said vessel.

11. The plaintiffs, as owners of the derelict vessel "Mary," of the port of _____, claim to be put in possession of the said vessel and her cargo.

12. *By salvors.*

The plaintiffs, as the owners, master and crew of the vessel "Caroline," of the port of _____, claim the sum of £., for salvage services performed by them to the vessel "Mary," off the Goodwin Sands, on the _____ day of _____.

13. *Claim for towage.*

The plaintiffs, as owners of the steam-tug "Jane," of the port of _____, claim £., for towage services performed by the said steam-tug to the vessel "Mary," on the _____ day of _____.

14. *Seamen's wages.*

The plaintiffs, as seamen on board the vessel "Mary," claim £., for wages due to them, as follows (1), the mate 30% for two months' wages from the _____ day of _____.

15. *For necessaries.*

The plaintiffs claim £., for necessaries supplied to the vessel "Mary," at the port of Newcastle-on-Tyne, delivered on the _____ day of _____ and the _____ day of _____.

SECTION VII.

SPECIAL INDORSEMENTS UNDER ORDER III., RULE 6.*

1. The plaintiff's claim is for the price of goods sold. The following are the particulars:—

* See also, as to special indorsements, Order XIII., Rules 3 and 4; Order XIV., and Order XXI., Rule 4. In many claims falling under Order III., Rule 6, the plaintiff may especially indorse his writ in addition to generally indorsing it under sections II. and III, *supra*.

Lush, J., at chambers, held that "For balance of account for goods sold" was a good special indorsement. "There is a form of special indorsement," he said, "in Appendix (A)—for butcher's meat supplied—exactly like the one in question. It could not be intended that a list of items extending, perhaps, over three or four years should be indorsed upon the writ." 1 Charley's Cases (Chambers), 44; Coe's Practice of the Judges' Chambers, 53.

COURT OF JUDICATURE ACTS, 1873 AND 1875. 799

| | | | | |
|--|-----|----|----|------------------------------|
| 1873—31st December.— | £ | s. | d. | Appendix A, F. II., s. 7. |
| Balance of account for butcher's meat to this date | 35 | 10 | — | |
| 1874—1st January to 31st March.— | | | | |
| Butcher's meat supplied | 74 | 5 | — | |
| | 109 | 15 | — | |
| 1874—1st February.—Paid. | 45 | — | — | |
| Balance due | £ | 64 | 15 | — |

2. The plaintiff's claim is against the defendant *A. B.* as principal, and against the defendant *C. D.* as surety, for the price of goods sold to *A. B.* The following are the particulars:—

1874—2nd February. Guarantee by *C. D.* of the price of woollen goods to be supplied to *A. B.*

| | | | |
|-------------------------------|-----|-----|----|
| | £ | s. | d. |
| 2nd February—To goods | 47 | 15 | — |
| 3rd March—To goods | 105 | 14 | — |
| 17th March—To goods | 14 | 12 | — |
| 5th April—To goods | 34 | — | — |
| | £ | 202 | 1 |

3. The plaintiff's claim is against the defendant, as maker of a promissory note. The following are the particulars:

Promissory note for 250*l.*, dated 1st January, 1874, made by defendant, payable four months after date.

| | |
|--------------------|-----|
| | £ |
| Principal- - - - - | 250 |
| Interest - - - - - | |

4. The plaintiff's claim is against the defendant *A. B.* as acceptor, and against the defendant *C. D.* as drawer, of a bill of exchange. The following are the particulars:—

Bill of exchange for £500, dated 1st January, 1874, drawn by defendant *C. D.* upon and accepted by defendant *A. B.*, payable three months after date.

| | |
|---------------------|-----|
| | £ |
| Principal - - - - - | 500 |
| Interest - - - - - | |

5. The plaintiff's claim is for principal and interest due upon a bond. The following are the particulars:—

Bond dated 1st January, 1873. Condition for payment of £100, on the 26th December, 1873.

| | |
|-------------------------|----|
| | £ |
| Principal due - - - - - | 50 |
| Interest - - - - - | |

**Appendix A,
P. II., s. 7.**

6. The plaintiff's claim is for principal and interest due under a covenant.

The following are the particulars:—

| | | | | | |
|-----------------|------------------------------------|---|---|---|-----|
| Deed dated | covenant to pay £100 and interest. | | | | |
| Principal due - | - | - | - | - | £80 |
| Interest - | - | - | - | - | - |

SECTION VIII.

*Indorsements of Character of Parties.**

Executors.

The plaintiff's claim is as executor [*or administrator*] of *C. D.*, deceased, for, &c.

The plaintiff's claim is against the defendant *A. B.*, as executor [*or, &c.*] of *C. D.*, deceased, for, &c.

The plaintiff's claim is against the defendant *A. B.*, as executor of *X. Y.*, deceased, and against the defendant *C. D.*, in his personal capacity for, &c.

By husband and wife, executrix.

The claim of the plaintiff *C. D.* is as executrix of *X. Y.* deceased, and the claim of the plaintiff *A. B.*, as her husband, for .

Against husband and wife, executrix.

The claim of the plaintiff is against the defendant *C. D.*, as executrix of the defendant *C. D.*, deceased, and against the defendant *A. B.*, as her husband for .

The plaintiff's claim is as trustee under the bankruptcy of *A. B.*, for .

Trustee in bankruptcy.

The plaintiff's claim is against the defendant as trustee under the bankruptcy of *A. B.*, for .

The plaintiff's claim is as [*or the plaintiff's claim is against the defendant as*] trustee under the will of *A. B.* [*or under the settlement upon the marriage of A. B. and X. Y. his wife*].

Trustees.

Public officer.

The plaintiff's claim is as public officer of the Bank for .

The plaintiff's claim is against the defendant as public officer of the Bank, for .

The plaintiff's claim is against the defendant *A. B.* as principal, and against the defendant *C. D.* as public officer of the Bank, as surety, for .

The plaintiff's claim is against the defendant as heir-at-law of *A. B.*, deceased.

Heir and devisee.

The plaintiff's claim is against the defendant *C. D.* as heir-at-law, and against the defendant *E. F.* as devisee of lands under the will of *A. B.*

Qui tam action

The plaintiff's claim is as well for the Queen as for himself, for .

* These forms are intended to illustrate Order III., Rule 4, *supra*.

APPENDIX (B).

Appendix F,
Form 1.

FORM 1.

*Notice by Defendant to Third Party.**

187 . [Here put the letter and number.]

Notice filed , 187

In the High Court of Justice,
Queen's Bench Division.Between *A. B.*, plaintiff,
and
C. D., defendant.

To Mr. X. Y.

Take notice that this action has been brought by the plaintiff against the defendant [as surety for *M. N.*, upon a bond conditioned for payment of £2,000 and interest to the plaintiff.

The defendant claims to be entitled to contribution from you to the extent of one-half of any sum which the plaintiff may recover against him, on the ground that you are [his co-surety under the said bond, *or*, also surety for the said *M. N.*, in respect of the said matter, under another bond made by you in favour of the said plaintiff, dated the day of , A.D.]].

Or, [as acceptor of a bill of exchange for £500, dated the day of A.D. , drawn by you before and accepted by the defendant, and payable three months after date.

The defendant claims to be indemnified by you against liability under the said bill, on the ground that it was accepted for your accommodation.]

Or, [to recover damages for a breach of a contract for the sale and delivery to the plaintiff of 1,000 tons of coal.

The defendant claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by him on your behalf and as your agent].

And take notice that, if you wish to dispute the plaintiff's claim in this action as against the defendant *C. D.*, you must cause an appearance to be entered for you within eight days after service of this notice.

In default of your so appearing, YOU WILL NOT BE ENTITLED in any future proceeding between the defendant *C. D.* and yourself to DISPUTE

* This form is intended to illustrate Order XVI., Rule 18, *supra*. The notice must state the *nature* and *grounds* of the claim. It must be served within the time limited for delivering a statement of defence. It is not necessary to give notice under the above Rule of a claim by a defendant against his co-defendant. This form applies only to a "person not a party to the action." Order XVI., Rule 18.

Appendix B, Form 1. THE VALIDITY OF THE JUDGMENT IN THIS ACTION whether obtained by consent or otherwise.*

(Signed) *E. T.*

Or,

X. Y.,

Solicitor for the defendant,
E. T.

Appearance to be entered at

Form 2.†

187 . [*Here put the letter and number.*]

In the High Court of Justice,
Queen's Bench Division.

Between *A. B.*, plaintiff,

and

C. D., defendant.

The plaintiff confesses the defence stated in the paragraph of the defendant's statement of defence [*or, of the defendant's further statement of defence*].

Form 3.‡

187 . [*Here put the letter and number.*]

In the High Court of Justice,
Division.

Between *A. B.*, plaintiff,

and

C. D., defendant.

The particulars of the plaintiff's complaint herein, and of the relief and remedy to which he claims to be entitled, appear by the indorsement upon the writ of summons.

* These words are important as shewing the precise effect of this new form of procedure. It is not the intention of Order XVI., Rule 18, to enable one defendant to *obtain relief* against another, but only to bind the third party by what is decided between the plaintiff and defendant. Per the Court of Appeal in *Craven v. Bray*, 1 Charley's Cases (Court), 11.

† The form is intended to illustrate Order XX., Rule 3, *supra*.

The object of that Rule is to enable a plaintiff, who confesses a plea *puis darrein continuance*, to sign judgment for his costs up to the time that the plea was pleaded.

‡ This form is intended to illustrate Order XXI., Rule 4, *supra*.

It takes the place of "an ordinary statement of claim, and must be marked on the face in the same manner." *Ib.* It is only where the writ is specially indorsed, and the defendant has not dispensed with a statement of claim, that the form can be used. *Ib.* For forms of special indorsements of claim, see App. (A), Part. II., section VII. See as to special indorsements generally, Order III., Rule 6, and Order XIV., *supra*.

FORM 4.*

Appendix B,
Form 4.

“ To the within-named X. Y.

“ Take notice, that if you do not appear to the within counterclaim of
 “ the within-named C. D. within eight days from the service of this defence
 “ and counterclaim upon you, YOU WILL BE LIABLE TO HAVE JUDGMENT
 “ GIVEN AGAINST YOU IN YOUR ABSENCE.

“ Appearances are to be entered at .”

FORM 5.†

Notice of Payment into Court.

In the High Court of Justice,

1875. B. No.

Q. B. Division.

A. B. v. C. D.

Take notice, that the defendant has paid into Court £ , and
 says that that sum is enough to satisfy the plaintiff's claim [*or the plain-
 tiff's claim for, &c.*]

To Mr. X. Y.,

— the plaintiff's Solicitor.

Z.,

Defendant's Solicitor.

* This form is intended to illustrate Order XXII., Rule 6, *supra*.

It is to be indorsed upon the statement of defence by a defendant who sets up a counterclaim which raises questions between himself and “ any other person ;” and a copy of the statement of defence, so indorsed, is to be served upon such last-mentioned person, when he is not a party to the action.

“ You will be liable to have judgment given against you.” The third party, served with Form 1 of this Appendix, is only liable to be estopped from disputing the validity of the judgment; the third party served with a defence indorsed as above is to be liable to have judgment given *against him*.

The above form of indorsement is incomplete. The following words should be added: “ Dated the day of
 187 . Yours, &c., A. B., Solicitor for the defendant. To E. F.,
 Solicitor for C. D.”

The statement of defence, so indorsed, must be served on the third party in the same manner as if it were a statement of claim. Order XXI., Rule 4.

† This form is the one required to be used under and by Order XXX., Rule 2, *supra*.

The date of the notice should be added to the form before the words “ To Mr.”, thus:—“ dated the day of 187 .”

This form is only to be used where the money is paid into Court by the defendants before delivering a defence. Order XXX., Rule 2.

Appendix B,
Form 6.

FORM 6.

*Acceptance of Sum paid into Court.**

In the High Court of Justice,
Q. B. Division.

1875. B.

A. B. v. C. D.

Take notice that the plaintiff accepts the sum of £ paid
into Court in satisfaction of the claim in respect of which it is paid

FORM 7.

Form of Interrogatories.†

In the High Court of Justice,
Division.

1874. E

Between *A. B.*, plaintiff,
and

C. D., *E. F.* and *G. H.*, defendants.

Interrogatories on behalf of the above-named [*plaintiff*, or *A. B.*
C. D.] for the examination of the above-named [*defendants E. F. and G. H.*
or *plaintiff*].

1. Did not, &c.

2. Has not, &c.

&c. &c. &c.

[*The defendant E. F. is required to answer the interrogatories numbered 1 and 2.*]

[*The defendant G. H. is required to answer the interrogatories numbered 1, 2, and 3.*]

FORM 8.

Form of Answer to Interrogatories.‡

In the High Court of Justice,
Division.

1874. B. No.

Between *A. B.*, plaintiff,
and

C. D., *E. F.*, and *G. H.*, defendants.

The answer of the above-named [defendant *E. F.*] to the interrogatories
for his examination by the above-named [plaintiff].

* This form is the one required to be used under and by Order
Rule 4, *supra*.

This notice is applicable, whether the money be paid into Court
defence, or by leave "at any later time." In the former case, before
this notice must be given by the plaintiff to the defendant "within
days after the receipt of" the notice contained on Form 6. *supra*
latter case, it must be given "before reply." If a plaintiff accepts
money, and gives no notice of his accepting it, he may have to pay
defendant's costs, instead of being allowed his own. *Longridge v. Bell*, 46 L. J. (Ch.), 377; 36 L. T., 64.

† This is the form prescribed by Order XXXI., Rule 3, *supra*.

The form is incomplete. The following words should be added
at the end: "Such several interrogatories must be answered by a
to be filed within ten days, or such further time as a Judge may
Dated the day of 187 . Yours, &c., X. Y.,
to M. N., Solicitor for." See Order XXXI., Rule 6.

‡ This form is prescribed by Order XXXI., Rule 7, *supra*.

In answer to the said interrogatories, I, the above-named [E. F.], make oath and say as follows:—

Appendix B,
Form 8.

FORM 9.

*Form of Affidavit as to Documents.**

In the High Court of Justice,

1874. B. No.

Division.

Between A. B., plaintiff,

and

C. D., defendant.

I, the above-named defendant C. D., make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts† of the first Schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first Schedule hereto.

3. That [*here state upon what grounds the objection is made, and verify the facts as far as may be*].

4. I have had, but have not now, in my possession or power, the documents relating to the matters in question in this suit set forth in the second Schedule hereto.

5. The last-mentioned documents were last in my possession or power on [*state when*].

6. That [*here state what has become of the last-mentioned documents, and in whose possession they now are*].

7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent or in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of, or extract from any such document, or any other document whatsoever, relating to the matters in

* This is the form prescribed by Order XXXI., Rules 13 and 16, *supra*. The affidavit must be printed if it exceeds 10 folios in length. *Ib.* A Judge may, however, permit the affidavit to be written. *Ib.* The affidavit must be sworn before a Commissioner to Administer Oaths in the Supreme Court, and this must appear in the *jurat*, at the end, thus: "Sworn at _____ in the _____ of _____ this

day of

187 , before me

a Commissioner to Administer Oaths in the Supreme Court."

† The Schedule should be divided into two parts, when the deponent objects to the production of any of the documents. The first part is to contain the documents in the deponent's possession, to the production of which he does not object. The second part is to contain the documents in the deponent's possession, if any, to the production of which he objects.

**Appendix B,
Form 9.**

question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them [other than and except the documents set forth in the said first and second Schedules hereto.]*

FORM 10.

Form of Notice to produce Documents.†

In the High Court of Justice,
Q. B. Division.

A. B. v. C. D.

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*statement of claim or defence, or affidavit, dated the* *day of* *A.D.*]

Describe documents required.

X. Y.,

Solicitor to the

To *Z.,*

Solicitor for

* The words "other than," &c., in brackets should be omitted, and also paragraphs 1, 2, 3, 4, 5 and 6, if the deponent denies that he has or had any documents in his possession or power relating to the matters in question.

The form of *jurat* will be the same as in the answer to interrogatories, Form No. 8, *supra*. See the note to that form.

The form of affidavit of documents given in this form is exhaustive in its terms, and must be followed. Per Lindley J., at chambers. 2 Charley's Cases (Chambers), 71.

In an action begun before the 1st of November, 1875, but continued after that date, the affidavit of documents must be in this Form. Per Quain, J., at chambers. *Ib.*, 112.

"A bundle of documents relating exclusively to my own title," is not a sufficient description, although the defendant swears that the documents in question will not help the plaintiff's case. The defendant must in an action relating to land, even when he denies the plaintiff's title, and states fully his own, specify in detail in his affidavit of documents, or if it is deficient, in his further affidavit of documents, all the documents in his possession relating to the subject-matter of the action, although he may not be compellable to produce them at the hearing. *Fortescue v. Fortescue*, 34 L. T., 817; 24 W. R., 945.

† The form is the one required to be used under and by Order XXXI., Rule 15, *supra*. It is rather a notice to inspect than a "notice to produce." The old form of notice to produce *at the trial* is still in force. "Describe documents required." The Schedule can be conveniently arranged in two parallel columns: a smaller column, headed "date," and a larger column, headed "description of documents." The date of the notice should follow the Schedule, thus "Dated the day of

187 ."

FORM 11.

*Form of Notice to inspect Documents.**

Appendix B,
Form 11.

In the High Court of Justice,
Q. B. Division.

A. B. v. C. D.

Take notice that you can inspect the documents mentioned in your notice of the day of A.D. [*except the deed numbered in that notice*] at my office, on Thursday next, the instant, between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of the documents mentioned in your notice of the day of A.D., on the ground that [*state the ground*].

FORM 12.

Form of Notice to admit Documents.†

In the High Court of Justice.
Division.

A. B. v. C. D.

Take notice, that the plaintiff [*or defendant*] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or plaintiff*] his solicitor or agent, at , on , between the hours of ; and the defendant [*or plaintiff*] is hereby required within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, &c.

To E. F. Solicitor [*or Agent*] for Defendant [*or Plaintiff*].

G. H. Solicitor [*or Agent*] for Plaintiff [*or Defendant*].

* This is the form which is prescribed in Order XXXI., Rule 16, *supra*.

It is practically two forms in one—a notice conceding inspection, and a notice objecting to inspection. Both forms require to be supplemented by the addition of the following words:—"Dated the day of 187 . Yours, &c., E. F., Solicitor for To G. H., Solicitor for ."

The party requiring inspection must, if the opposite party objects to inspection, apply to a Judge for an order for inspection. Order XXXI., Rule 17.

† This form is intended to illustrate Order XXXII., Rule 3, *supra*.

No costs of proving any document shall be allowed if this notice be not given, unless the Taxing-Master consider the omission to give the notice as a saving of expense. Order XXXII., Rule 2.

Appendix B,
Form 12.

[Here describe the Documents, the manner of doing which may be as follows]:—

ORIGINALS.

| Description of Documents. | Dates. |
|---|--------------------|
| Deed of Covenant between A. B. and C. D., first part, and E. F., second part | January 1 .. 1848 |
| Indenture of Lease from A.B. to C.D. | February 1 .. 1848 |
| Indenture of Release between A. B., C. D., first part, &c. | February 2 .. 1848 |
| Letter, Defendant to Plaintiff | March 1 .. 1848 |
| Policy of Insurance on Goods by Ship "Isabella," on voyage from Oporto to London | December 3 .. 1847 |
| Memorandum of Agreement between C. D., Captain of said Ship, and E. F. | January 1 .. 1848 |
| Bill of Exchange for £100 at three months, drawn by A. B. on and accepted by C. D., indorsed by E. F. and G. H. | May 1 .. 1849 |

COPIES.

| Description of Documents. | Dates. | Original or Duplicate, served, sent, or delivered, when, how and by whom. |
|---|--------------------------|---|
| Register of Baptism of A.B. in the Parish of X | January 1.. 1848 | |
| Letter, plaintiff to defendant | February 1..1848 | Sent by General Post, 2 February, 1848 |
| Notice to produce papers .. | March 1 .. 1848 | Served, 2 March, 1848, on defendant's attorney, by E.F. of —. |
| Record of a Judgment of the Court of Queen's Bench, in an action, J.S. v. J.N. .. | Trinity Term, 10th Vict. | |
| Letters Patent of King Charles II. in the Rolls Chapel .. | January 1..1680.* | |

* This form is identical in every particular (except the heading), with the form of Notice to Admit documents set forth in the General Rules of Hilary Term, 1853, Rule 29.

FORM 13.

*Setting down Special Case.**Appendix B.
Form 13.In the High Court of Justice,
Division.

1875. B. No.

Between *A. B.*, plaintiff,
and*C. D.* and others, defendants.Set down for argument the special case filed in this action on the
day of , 187 .*X. Y.*, Solicitor for .

FORM 14.

*Form of Notice of Trial.†*In the High Court of Justice,
Division.*A. B. v. C. D.*Take notice of trial of this action [*or of the issues in this action
ordered to be tried*] BY A JUDGE AND JURY [*or as the case may be*] IN MIDDLE-
SEX, [*or as the case may be*] for the day of next.*X. Y.*, plaintiff's Solicitor [*or as the case may be*].

Dated

To *Z.*, defendant's Solicitor [*or as the case may be*].

FORM 15.

Form of Certificate of Officer after Trial by a Jury.‡

30th November, 1876.

1876. No.

In the High Court of Justice,
Division.Between *A. B.*, plaintiff,
and
C. D., defendant.

* This form is the one required to be used under and by Order XXXIV., Rule 5, *supra*. Either party may enter a special case for argument by delivering this Memorandum of Entry to the proper officer. *Ib.*

Forms of Statement of Special Case will be found in the Schedule to the Rules of Michaelmas Vacation, 1854, Nos. 11 and 14.

† This form is intended to illustrate Order XXXVI., Rule 8.

No particular form of words was necessary to constitute a good notice of trial, provided it clearly informed the party in sufficient time when and where the cause was to be tried. *Cory v. Hotsun*, 1 L. M. and P., 23. Day's Common Law Procedure Acts, p. 124 (4th edition). See *Fenn v. Green*, 6 E. and B., 656; *Kerry v. Reynolds*, 4 Dowl., 234.

The date of the notice should be inserted in the form before the name of the plaintiff's Solicitor, thus "Dated the day of 187 ."

‡ This form illustrates Order XXXVI., Rule 24.

The form is only applicable where "the Judge shall direct that any judgment be entered for any party absolutely."

The production of this certificate, sealed with the seal of the Court, is a sufficient authority to the officer to enter the judgment accordingly.

**Appendix B,
Form 15.**

I certify that this action was tried before the Honourable Mr. Justice
and a [special] jury of the county of _____ on the 12th
and 13th days of November, 1876.

The jury found [*state findings*].

The Judge directed that judgment should be entered for the plaintiff
for £ _____ [with costs of summons, *or as the case may be*].

A.B.

[*Title of Officer.*]

Form 16.***Affidavit of Scripts.****

In the High Court of Justice.

Probate Division.

Between **A.B.** - - - - - plaintiff,
and
C.D. - - - - - defendant.

I, **A.B.** of _____, in the county of _____
party in this cause, make oath and say, that no paper or parchment
writing, being or purporting to be or having the form or effect of a will
or codicil or other testamentary disposition of **E.F.**, late of _____,
in the county of _____, deceased, the deceased in
this cause, OR BEING OR PURPORTING TO BE INSTRUCTIONS FOR, OR THE
DRAFT OF, ANY WILL, OR TESTAMENTARY DISPOSITION OF THE SAID **E.F.**, has
at any time, either before or since his death, come to the hands, possession,
or knowledge of me, this deponent, or to the hands, possession, or knowledge
of my solicitors in this suit, so far as is known to me, this deponent, save
and except the true and original last will and testament of the said de-
ceased now remaining in the principal registry of this court [*or hereunto*
annexed, or as the case may be], the said will bearing date the
day of _____ 18 _____ [*or as the case may be*], also save and
except [*here add the dates and particulars of any other testamentary papers*
of which the deponent has any knowledge].

(Signed) **A.B.**,

Sworn at _____ on the _____ day of _____ 18 _____

Before me,

[*Person authorised to administer oaths under the Act.*]

* This form illustrates Order XXI., Rule 2, *supra*. Except the words
in small capital letters, this Form is copied from the Schedule (No. 10),
to the Rules of the Court of Probate in contentious business.

APPENDIX (C).

No. 1.

ACCOUNT STATED

In the High Court of Justice, 187 . B. No. .†
‡ Division.

Writ issued 3rd August, 1875.

Between *A.B.* - - - plaintiff,
and
E.F. - - - defendant.

Statement of Claim.

1. Between the 1st of January and the 28th of February, 1875, the plaintiff supplied to the defendant various articles of drapery ; and accounts and invoices of the goods so supplied, and their prices, were from time to time furnished to the defendant, and payments on account were from time to time made by the defendant.

2. On the 28th of February, 1875, a balance remained due to the plaintiff of £75. 9s., and an account was on that day sent by the plaintiff to the defendant showing that balance.

3. On the 1st of March following, the plaintiff's collector saw the defendant at his house, and asked for payment of the said balance, and the defendant then paid him by cheque £25 on account of the same. The residue of the said balance, amounting to £50. 9s., has never been paid.

The plaintiff claims £

The plaintiff proposes that this action should be tried in the county of Northampton.‡

* Appendix (C) is intended to illustrate Order XIX., Rule 4, *supra*. See the note to that Rule. The fact that a particular form of pleading (*e.g.* replying specially by way of confession and avoidance) is used in these Precedents, was referred to by Bramwell, L.J., in *Hall v. Fre*, 4 Ch. D., 341 ; 46 L. J. (Ch.), 145 ; 25 W. R., 177, as a reason why such a form of pleading should be allowed.

† See Order V., Rule 8.

‡ Queen's Bench, Common Pleas, or Exchequer.

§ See as to venue Order XXXVI., Rule 1.

Appendix C,
No 2.No. 2.
ADMINISTRATION OF ESTATE.

In the High Court of Justice, [1876. B. No. 233.]
 Chancery Division.*
 [Name of Judge.]†

Writ issued 22nd December, 1876.

In the matter of the estate of *A.B.*, deceased.

Between *E.F.* - - - plaintiff,
 and
G.H. - - - defendant.

Statement of Claim.

1. *A.B.* of *K.*, in the county of *L.*, died on the 1st of July, 1875, intestate. The defendant *G.H.* is the administrator of *A.B.*

2. *A.B.* died entitled to lands in the said county for an estate of fee simple, and also to some other real estate and to personal estate. The defendant has entered‡ possession of the real estate of *A.B.* and received the rents thereof. The legal estate in such real estate is outstanding in mortgages§ under mortgages created by the intestate.

3. *A.B.* was never married: he had one brother only, who predeceased him without having been married, and two sisters only, both of whom also predeceased him, namely *M.N.* and *P.Q.* The plaintiff is the only child of *M.N.*, and the defendant is the only child of *P.Q.*

The plaintiff claims—

1. To have the real and personal estate of *A.B.* administered in this Court, and for that purpose to have all proper directions given and accounts taken.
2. To have a receiver appointed of the rents of his real estate.
3. Such further or other relief as the nature of the case may require.

[1876. B. No. 233.]

In the High Court of Justice.
 Chancery Division.
 [Name of Judge.]

In the matter of the estate of *A.B.*, deceased.

Between *E.F.* - - - plaintiff,
 and
G.H. - - - defendant.

Statement of Defence.

1. The plaintiff is an illegitimate child of *M.N.* She was never married.

* See s. 34 of the Principal Act, *supra*.

† See as to marking the name of the Judge in the Chancery Division, s. 42 of the Principal Act, and Order V., Rule 4a, *supra*.

‡ The word "into" has evidently been omitted here. § *Sic.* Mortgagees.

2. The intestate was not entitled to any real estate at his death, except a copyhold estate situate in the county of *R.*, and held of the manor of *S.* According to the custom of that manor, when the copyholder dies without issue, and without leaving a brother, or issue of a deceased brother, the copyhold descends to his elder sister and her issue in preference to his younger sister and her issue. *P.Q.* was older than *M.N.*

Appendix C,
No. 2.

3. The personal estate of *A.B.* was not sufficient for the payment of his debts, and has all been applied in payment of his funeral and testamentary expenses, and part of his debts.

[1876. B. No. 233.]

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]

In the matter of the estate of *A.B.*, deceased.

Between *E.F.* - - - - - plaintiff,

and

G.H. - - - - - defendant.

Reply.

The plaintiff joins issue with the defendant upon his defence.*

No. 3.

[ADMINISTRATION OF ESTATE.]

[1876. B. No. 234.]

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]

Writ issued 22nd December, 1876.

In the matter of the estate of *A.B.*, deceased.

Between *E.F.* - - - - - plaintiff,

and

G.H. - - - - - defendant.

Statement of Claim.

1. *A.B.* of *K.*, in the county of *L.*, duly made his last will, dated the 1st day of March, 1873, whereby he appointed the defendant and *M.N.* (who died in the testator's lifetime) executors thereof, and devised and bequeathed his real and personal estate to and to the use of his executors, in trust to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his real estate for the person who would be the

* See Order XIX., Rule 21. *supra.*

3. The testator was at his death entitled to real and the defendant entered into the receipt of the rents of it got in the personal estate; he has sold some part of the The plaintiff claims—

1. To have the real and personal estate of *A.B.* administered in the Court, and for that purpose to have all proper and accounts taken.
2. Such further or other relief as the nature of the case requires.

[1876.]

In the High Court of Justice,
Chancery Division.

[*Name of Judge.*]

In the matter of the estate of *A.B.*, deceased

Between *E.F.* - - - - - plaintiff
and
G.H. - - - - - defendant

Statement of Defence.

1. *A.B.*'s will contained a charge of debts; he died intestate, and was entitled at his death to some real estate which the defendant received, which produced the net sum of £4,300, and the testator's personal estate which the defendant got in and which produced a net sum of £1,204. The defendant applied the whole of the sum of £54, which the defendant received from the real estate, in the payment of the funeral and testamentary

[1876. B. No. 234.] Appendix C.
No. 3.

In the High Court of Justice,
Chancery Division.
[Name of Judge.]

In the matter of the estate of *A.B.*, deceased.
Between *E.F.* - - - - - plaintiff,
and
G.H. - - - - - defendant.

Reply.

The plaintiff joins issue with the defendant upon his defence.

No. 4.

[ADMINISTRATION OF ESTATE.]

[1876. B. No. 235.]

In the High Court of Justice,
Chancery Division.
[Name of Judge.]

In the matter of the estate of *W.H.*, deceased.

Writ issued 22nd December, 1876.

Between *A.B.* and *C.* his wife - - - plaintiffs,
and
E.F. and *G.H.* - - - defendants.

Statement of Claim.

1. *W. H.*, of *H.*, in the county of *L.*, duly made his last will, dated the 19th day of March, 1861, whereby he appointed the defendants the executors thereof, and bequeathed to them all his personal estate in trust, to call in, sell, and convert the same into money, and thereout to pay his debts and funeral and testamentary expenses, and to divide the ultimate surplus into three shares, and to pay one of such three shares to each of his two children, *T. H.*, and *E.*, the wife of *E. W.*, and to stand possessed of the remaining third share upon trust for the children of the testator's son *J. H.* in equal shares, to be divided among them when the youngest of such children should attain the age of 21 years. And the testator devised his real estates to the defendants upon trust until the youngest child of the said *J. H.* should attain the age of 21 years, to pay one third part of the rents thereof to the said *T. H.*, and one other third part thereof to the said *E. W.*, and to accumulate the remaining third part by way of compound interest, and so soon as the youngest child of the said *J. H.* should attain the age of 21 years, to sell the said real estates, and out of the proceeds of such sale to pay the sum of £1,000 to the said *T. H.*, and to invest one moiety of the residue in manner therein mentioned, and stand possessed thereof in trust to pay the income thereof to the said *E.*, the wife of the said *E. W.*, during her life for her separate

**Appendix C,
No. 4.**

use, and after her death for her children, the interests of such children being contingent on their attaining the age of 21 years, and to divide the other moiety of such proceeds of sale and the accumulations of the third share of rents thereinbefore directed to be accumulated among such of the children of the said J. H. as should be then living, and the issue of such of them as should be then dead, in equal shares *per stirpes*.

2. The testator died on the 25th day of April, 1873, and his said will was proved by the defendants in the month of June, 1873.

3. The testator died possessed of one third share in a leasehold colliery called the Paradise Colliery, and in the engines, machinery, stock in trade, book debts, and effects belonging thereto. He was also entitled to real estate, and other personal estate.

4. The testator left T. H. and E., the wife of E. W., him surviving. J. H. had died in the testator's lifetime, leaving four children, and no more. The plaintiff C. B. is the youngest of the children of J. H., and attained the age of 21 years on the 1st of June, 1871. The other three children of J. H. died without issue in the lifetime of the testator.

5. E. W. has several children, but no child has attained the age of 21 years.

6. T. H. is the testator's heir-at-law.

7. The defendants have not called in, sold, and converted into money the whole of the testator's personal estate, but have allowed a considerable part thereof to remain outstanding; and in particular the defendants have not called in, sold, or converted into money the testator's interest in the said colliery, but have, from the death of the testator to the present time, continued to work the same in partnership with the other persons interested therein. The estate of the testator has sustained considerable loss by reason of such interest not having been called in, sold, or converted into money.

8. The defendants did not upon the death of the testator sell the testator's furniture, plate, linen, and china, but allowed the testator's widow to possess herself of a great part thereof, without accounting for the same, and the same has thereby been lost to the testator's estate.

9. The defendants have not invested the share of the testator's residuary personal estate given by his will to the children of the testator's son J. H., and have not accumulated one-third of the rents and profits of his real estate as directed by the said will, but have mixed the same share and rents with their own moneys, and employed them in business on their own account.

10. The defendants have sold part of the real estates of the testator, but a considerable part thereof remains unsold.

11. A receiver ought to be appointed of the outstanding personal estate of the testator, and the rents and profits of his real estate remaining unsold.

The plaintiffs claim :—

Appendix C,
No. 4.

- . That the estate of the said testator may be administered, and the trusts of his will carried into execution under the direction of the Court.
- . That it may be declared that the defendants, by carrying on the business of the said colliery instead of realizing the same, have committed a breach of trust, and that the parties interested in the testator's estate are entitled to the value of the testator's interest in the said partnership property as it stood at the testator's death, with interest thereon, or, at their election, to the profits which have been made by the defendants in respect thereof since the testator's death, whichever shall be found most for their benefit.
- . That an account may be taken of the interest of the testator in the said colliery, and in the machinery, book debts, stock, and effects belonging thereto, according to the value thereof at the testator's death, and an account of all sums of money received by or by the order, or for the use of the defendants, or either of them, on account of the testator's interest in the said colliery, and that the defendants may be ordered to make good to the estate of the testator the loss arising from the not having realized the interest of the testator in the said colliery within a reasonable time after his decease.
- . That an account may be taken of all other personal estate of the testator come to the hands of the defendants, or either of them, or to the hands of any other person by their or either of their order, or for their or either of their use, or which, but for their wilful neglect or default, might have been so received; and an account of the rents and profits of the testator's real estate, and the moneys arising from the sale thereof, possessed or received by or by the order, or for the use of the defendants, or either of them.
- . That the real estate of the testator remaining unsold may be sold under the direction of the court.
- . That the defendants may be decreed, at the election of the parties interested in the testator's estate, either to pay interest at the rate of £5 per cent. per annum upon such moneys belonging to the estate of the testator as they have improperly mixed with their own moneys and employed in business on their own account, and that half-yearly rests may be made in taking such account as respects all moneys which by the said will were directed to be accumulated, or to account for all profits by the employment in their business of the said trust money.
- . That a receiver may be appointed of the outstanding personal estate of the testator, and to receive the rents and profits of his real estate remaining unsold.
- . Such further or other relief as the nature of the case may require.

Appendix C,
No. 41.

[1876. B. 236.]

In the High Court of Justice,
Chancery Division.

[Name of Judge.]

Between A.B. and C. his wife - - - plaintiffs,

and

E.F. and G.H. - - - defendants.

Statement of Defence of the above-named Defendants.

1. Shortly after the decease of the testator, the defendants, as his executors, possessed themselves of and converted into money the testator's personal estate, except his share in the colliery mentioned in the plaintiffs' statement of claim. The moneys so arising were applied in payment of part of the testator's debts and funeral and testamentary expenses, but such moneys were not sufficient for the payment thereof in full.

2. The Paradise colliery was, at the testator's decease, worked by him in partnership with J. Y., and W. Y., and T. Y., both since deceased. No written articles of partnership had been entered into, and for many years the testator had not taken any part in the management of the said colliery, but it was managed exclusively by the other partners, and the defendants did not know with certainty to what share therein the testator was entitled.

3. Upon the death of the testator, the defendants endeavoured to ascertain the value of the testator's share in the colliery, but the other partners refused to give them any information. The defendants thereupon had the books of the colliery examined by a competent accountant, but they had been so carelessly kept that it was impossible to obtain from them any accurate information respecting the state of the concern; it was, however, ascertained that a considerable sum was due to the testator's estate.

4. Between the death of the testator and the beginning of the year 1874 the defendants made frequent applications to J. Y., W. Y., and T. Y. for a settlement of the accounts of the colliery. Such applications having proved fruitless, the defendants, in January, 1874, filed their bill of complaint in the Court of Chancery against J. Y., W. Y., and T. Y., praying for an account of the partnership dealings between the testator and the defendants thereto, and that the partnership might be wound up under the direction of the Court.

5. The said T. Y. died in the year 1874, and the suit was revived against J. P. and T. S., his executors. The suit is still pending.

6. As to the Paradise colliery, the defendants have acted to the best of their judgment for the benefit of the testator's estate, and they deny being under any liability in respect of the said colliery not having been realised. They submit to act under the direction of the Court as to the further pro-

secution of the said suit, and generally as to the realization of the testator's interest in the said colliery. Appendix C,
No. 4.

7. With respect to the statements in the eighth paragraph of the statement of claim, the defendants say, that upon the death of the testator, they sold the whole of his furniture, linen, and china, and also all his plate, except a few silver teaspoons of very small value, which were taken possession of by his widow, and they applied the proceeds of such sale as part of the testator's personal estate, and they deny being under any liability in respect of such furniture, linen, china, and plate.

8. With respect to the statements in paragraph seven of the statement of claim, the defendants say that all moneys received by them, or either of them, on account of the testator's estate, were paid by them to their executorship account at the bank of Messrs. H. and Co., and until the sale of the testator's real estate took place as hereinafter mentioned, the balance to their credit was never greater than was necessary for the administration of the trusts of the testator's will, and they therefore were unable to make any such investment or accumulation as directed by the testator's will. No moneys belonging to the testator's estate have ever been mixed with the moneys of the defendant, or either of them, nor has any money of the testator's been employed in business since the testator's decease, except that his share in the said colliery, for the reason hereinbefore appearing, has not been got in.

9. In 1874, after the plaintiff *C.B.* had attained her age of 21 years the defendants sold the real estate of the testator for sums amounting to £15,080, and no part thereof remains unsold. They received the purchase moneys in December, 1874, and on the day of 1875, they paid such proceeds into Court to the credit of this action with the exception of \$500, retained on account of costs incurred and to be incurred by them.

[1876. B. No. 235.]

In the High Court of Justice,
Chancery Division.

[*Name of Judge.*]

Between *A.B.* and *C.* his wife - - - - plaintiffs,
and

E.F. and *G.H.* - - - - defendants.

Reply.

The plaintiff joins (*sic*) issue with the defendants upon their defence.

Appendix C,
No. 5.

No. 5.
AGENT.

187 . B. No.

In the High Court of Justice,
* Division.

Writ issued 3rd August, 1875.

Between *A.B.* and Company - - - plaintiffs,
and
E.F. and Company - - - defendants.

Statement of Claim.

1. The plaintiffs are manufacturers of artificial manures, carrying on business at , in the county of .
2. The defendants are commission agents, carrying on business in London.
3. In the early part of the year , the plaintiffs commenced, and down to the 187 , continued to consign to the defendants, as their agents, large quantities of their manures for sale, and the defendants sold the same, and received the price thereof and accounted to the plaintiffs therefor.
4. No express agreement has ever been entered into between the plaintiffs and the defendants with respect to the terms of the defendants' employment as agents. The defendants have always charged the plaintiffs a commission at per cent. on all sales effected by them, which is the rate of commission ordinarily charged by *del credere* agents in the said trade. And the defendants, in fact, always accounted to the plaintiffs for the price, whether they received the same from the purchasers or not.
5. The plaintiffs contend that the defendants are liable to them as *del credere* agents, but, if not so liable, are under the circumstances herein-after mentioned liable as ordinary agents.
6. On the , the plaintiffs consigned to the defendants for sale a large quantity of goods, including tons of .
7. On or about the , the defendants sold tons of part of such goods to one *G.H.* for £ , at three months' credit, and delivered the same to him.
8. *G.H.* was not, at that time, in good credit and was in insolvent circumstances, and the defendants might, by ordinary care and diligence, have ascertained the fact.
9. *G.H.* did not pay for the said goods, but before the expiration of the said three months for which credit had been given was adjudicated a bankrupt, and the plaintiffs have never received the said sum of £ or any part thereof.

The plaintiffs claim:—

1. Damages to the amount of £ .

* Queen's Bench, Common Pleas, or Exchequer.

2. Such further or other relief as the nature of the case may require. Appendix C,
No. 5.
The plaintiffs propose that this action should be tried in the county
of

[Title as in claim, omitting date of issue of writ.]

Statement of Defence.

1. The defendants deny that the said commission of per cent. mentioned in paragraph 4 of the claim is the rate of commission ordinarily charged by *del credere* agents in the said trade, and say that the same is the ordinary commission for agents other than *del credere* agents, and they deny that they ever accounted to the plaintiffs for the price of any goods, except after they had received the same from the purchasers.

2. The defendants deny that they were ever liable to the plaintiffs as *del credere* agents.

3. With respect to the eighth paragraph of the plaintiff's statement of claim, the defendants say that at the time of the said sale to the said *G.H.*, the said *G.H.* was a person in good credit. If it be true that the said *G.H.* was then in insolvent circumstances (which the defendants do not admit), the defendants did not and had no reason to suspect the same, and could not by ordinary care or diligence have ascertained the fact.

[Title as in defence.]

Reply.

The plaintiffs join issue upon the defendants' statement of defence.

No. 6.

BILL OF EXCHANGE.

187 . B. No.

In the High Court of Justice,

* Division.

Writ issued 3rd August, 1876.

Between *A.B.* and *C.D.* - - - plaintiffs,

and

E.F. and *G.H.* - - - defendants.

Statement of Claim.

1. Messrs. *M.N. & Co.* on the day of drew a bill of exchange upon the defendants for £ payable to the order of the said Messrs. *M.N. & Co.* three months after date, and the defendants accepted the same.

2. Messrs. *M.N. & Co.* indorsed the bill to the plaintiffs.

3. The bill became due on the , and the defendant has † not paid it.

The plaintiffs claim :—

* Queen's Bench, Common Pleas, or Exchequer. † Sic.

Statement of Defence.

1. The bill of exchange mentioned in the statement of claim was drawn and accepted under the circumstances hereinafter stated, and except as hereinafter mentioned there never was any consideration for the acceptance or payment thereof by the defendants.

2. Shortly before the acceptance of the said bill it was agreed between the said Messrs. *M.N. & Co.*, the drawers thereof, and the defendants, that the said Messrs. *M.N. & Co.* should sell and deliver to the defendants free on board ship at the port of _____ 1,200 tons of coals during the month of _____, and that the defendants should pay for the same by accepting the said Messrs. *M.N. & Co.*'s draft for £ _____ at six months.

3. The said Messrs. *M.N. & Co.* accordingly drew upon the defendants, and the defendants accepted the bill of exchange now sued upon.

4. The defendants did all things which were necessary to entitle them to delivery by the said Messrs. *M. N. & Co.* of the said 1,200 tons of coals under their said contract, and the time for delivery has long since elapsed: but the said Messrs. *M.N. & Co.* never delivered the same, or any part thereof, but have always refused to do so, whereby the consideration for the defendants' acceptance has wholly failed.

5. The plaintiffs first received the said bill, and it was first indorsed to them after it was overdue.

6. The plaintiffs never gave any value or consideration for the said bill.

7. The plaintiffs took the said bill with notice of the facts stated in the second, third, and fourth paragraphs hereof.

[Title.]

Reply.

1. The plaintiff joins issue upon the defendants' statement of defence.

2. The plaintiff gave value and consideration for the said bill in manner following, that is to say, on the _____ day of _____, 187____, the said Messrs. *M.N. & Co.* were indebted to the plaintiff in about £ _____, the balance of an account for goods sold from time to time by him to them. On that day they ordered of the plaintiff further goods to the value of about £ _____, which last-mentioned goods have since been delivered by him to them. And at the time of the order for such last-mentioned goods it was agreed between Messrs. *M.N. & Co.* and the plaintiff, and the order was received upon the terms, that they should indorse and hand over to him the bill of exchange sued upon, together with various other securities on account of the said previous balance, and the price of the goods so ordered on that day. The said securities, in-

cluding the bill sued upon, were thereupon on the same day indorsed and handed over to the plaintiff.*

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No. 8.*

No. 7.

BILL OF EXCHANGE AND CONSIDERATION.

187 . B. No.

In the High Court of Justice,

† Division.

Writ issued 3rd August, 1876.

Between *A.B.* and *C.D.* - - - plaintiffs,

and

E.F. and *G.H.* - - - defendants.*Statement of Claim.*

1. The plaintiffs are merchants, factors, and commission agents, carrying on business in London.

2. The defendants are merchants and commission agents, carrying on business at Hong Kong.

3. For several years prior to the , 1875, the plaintiffs had been in the habit of consigning goods to the defendants for sale, as their agents, and the defendants had been in the habit of consigning goods to the plaintiffs for sale, as their agents; and each party always received the price of the goods sold by him for the other; and a balance was from time to time struck between the parties and paid.

On the of , the moneys so received by the defendants for the plaintiffs, and remaining in their names, largely exceeded the moneys received by the plaintiffs for the defendants, and a balance of £ was accordingly due to the plaintiffs from the defendants.

4. On or about the , 1875, the plaintiffs sent to the defendants a statement of the accounts between them, showing the said sum as the balance due to the plaintiffs from the defendants, and the defendants agreed to the said statement of accounts as correct, and to the

* It will be perceived that, in his reply in this Precedent, the plaintiff first joins issue *generally* on the defendant's statement of defence, and *then* proceeds to reply *specially*, by way of confession and avoidance. In *Earp v. Henderson*, 3 Ch. D., 254, 34 L. T., 844, Bacon V.C., although his attention was called to this Precedent, held that such a mode of pleading was bad. In *Hall v. Eve*, 4 Ch. D., 341; 46 L. J. (Ch.), 145; 25 W. R., 177; 35 L. T., 735, in which a somewhat similar decision of Bacon, V.C., was overruled by the Court of Appeal, Bramwell, L.J., said that "the plaintiff may traverse the allegations made in the defence, or confess and avoid them, or both."

† Queen's Bench, Common Pleas, or Exchequer.

Appendix C, said sum of £ as the balance due by them to the plaintiffs,
No. 7. and agreed to pay interest on such balance if time were given to them.

5. The defendants requested the plaintiffs to give them three months' time for payment of the said sum of £ , and the plaintiffs agreed to do so upon the defendants accepting the bills of exchange hereinafter mentioned.

6. The plaintiffs thereupon on the drew two bills of exchange upon the defendants, one for £ and the other for £ , both payable to the order of the plaintiffs three months after date, and the defendants accepted the bills.

The said bills became due on the , 187 , and the defendants have not paid the bills, or either of them, nor the said sum of £

The plaintiffs claim

£ and interest to the date of judgment.

The plaintiffs propose that the action should be tried in London.*

No. 8.

187 . B. No.

In the High Court of Justice,
 Division.

Writ issued []

[THE "IDA."]†

Between *A.B.* and *C.D.* - - - plaintiffs,
 and

E.F. and *G.H.* - - - defendants.

Statement of Claim.

[1. The "Ida" is a vessel of which no owner or part owner was, at the time of the institution of this cause, domiciled in England or Wales.]‡

2. In the month of February 1873, Messrs. L. and Company, of Alexandria, caused to be shipped 6,110 ardebs of cotton seed on board the said vessel, then lying in Port Said (Egypt), and the then master of the vessel received the same, to be carried from Port Said to Hull, upon the terms of three bills of lading, signed by the master, and delivered to Messrs. L. and Company.

3. The three bills of lading, being in form exactly similar to one

* *I.E.*, at the Guildhall, City.

† In Admiralty action insert name of ship. [Statutory Note.]

‡ A statement to this effect may be inserted if the action be under sect. 6 of the Admiralty Act, 1861. [Statutory Note.]

another, were and are, so far as is material to the present case, in the words, letters, and figures following, that is to say :—

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No. 8.

“Shipped in good order and well conditioned by L. & Co., Alexandria
“ (Egypt) in and upon the good ship called the ‘Ida,’ whereof is
“ master for the present voyage Ambrozio Chiapella, and now riding
“ at anchor in the port of Port Said (Egypt) and bound for Hull,
“ six thousand one hundred and ten ardebs cotton seed, being
“ marked and numbered as in the margin, and are to be delivered
“ in the like good order and well-conditioned at the aforesaid Port
“ of Hull (the act of God, the Queen’s enemies, fire and all and
“ every other dangers and accidents of the seas, rivers, and naviga-
“ tion of whatever nature and kind soever, save risk of boats so far
“ as ships are liable thereto excepted), unto order or to assigns paying
“ freight for the said goods at the rate of (19s.) say nineteen
“ shillings sterling in full per ton of 20 cwt. delivered with £10
“ gratuity. Other conditions as per charter-party, dated London, 4th
“ October, 1872, with primage and average accustomed. In witness
“ whereof the master or purser of the said ship hath affirmed to three
“ bills of lading, all of this tenor and date, the one of which three
“ bills being accomplished the other two to stand void. Dated in
“ Port Said (Egypt) 6th February, 1873. 100 dunnage mats. Fifteen
“ working days remain for discharging.”

4. The persons constituting the firm of Messrs. L. and Company are identical with the members of the plaintiffs’ firm.

5. The vessel sailed on her voyage to Hull, and duly arrived there on or about the 7th day of May, 1873.

6. The cotton seed was delivered to the plaintiffs, but not in as good order and condition as it was in when shipped at Port Said; but was delivered to the plaintiff greatly damaged.

7. The deterioration of the cotton seed was not occasioned by any of the perils or causes in the bills of lading excepted.

8. By reason of the premises the plaintiffs lost a great part of the value of the said cotton seed, and were put to a great expense in and about keeping, warehousing, and improving the condition of the said cotton seed, and in and about having the same surveyed.

The plaintiffs claim the following relief:

1. 1. for damages, [*and the condemnation of the said vessel and the defendant and his bail in the same]:
2. Such further relief as the nature of the case requires.

* This may be inserted if the action be an Admiralty action in rem.
[Statutory Note.]

“ Ida,” and by the inherent qualities of the cotton seed, a
water in a severe storm which occurred on the d
in latitude during the voyage, or by some or one of
[Title.]

Reply.

The plaintiffs join issue upon the statement of defence.

No. 9.

BOTTOMRY.

187

In the High Court of Justice,
Admiralty Division.

Writ issued [].

THE “ONWARD.”

| | | | |
|-----------------------|-----|---|--------|
| Between A.B. and C.D. | - | - | plaint |
| | and | - | |
| E.F. and G.H. | - | - | defd |

Statement of Claim.

1. The “Onward,” a ship of 933 tons register, or there-
ing to the United States of America, whilst on a voyage
to Queenstown or Falmouth, for orders, and from thence
discharge in the United Kingdom or on the Continent, bet-
and Hamburg, both ports inclusive, laden with a cargo,
was compelled to put into Port Louis, in the island of
order to repair and refit.

2. The master of the “Onward,” being without funds at
Louis, and being unable to pay the expense of the said
necessary disbursements of the said ship at Port Louis, so
said ship to resume and prosecute her voyage, and after
communicated with his owners and with the owners and com-

bottomry, dated the 13th of October, 1870, by him duly executed in consideration of the sum of 24,369 dollars, Mauritius currency, paid to him by the said Messrs. H. and Company, bound himself and the said ship and her cargo, namely about 940 tons of teak timber, and her freight, to pay unto Messrs. H. and Company, their assigns or order or indorsees, the said sum of 24,369 dollars with the aforesaid maritime premium thereon, within twenty days next after the arrival of the "Onward" at her port of discharge from the said intended voyage, the said payment to be made, both in capital and interest, in British sterling money, at and after the rate of 4s. for every dollar, with a condition, that in case the said ship and cargo should be lost during her voyage from Port Louis to Queenstown or Falmouth, for orders, and thence to her port of discharge in the United Kingdom, or on the Continent between Bordeaux and Hamburg, both ports inclusive, then, that the said sum of 24,359 dollars, and maritime premium thereon, should not be recoverable.

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No. 62

3. The "Onward" subsequently proceeded on her voyage, and on the 7th of February, 1871, arrived with her cargo on board at the port of Liverpool, which was her port of discharge.

4. The bond was duly indorsed and assigned to the plaintiffs.

5. The ship has been sold by order of the Court, and the proceeds of the sale thereof have been brought into Court, and the freight has also been paid into Court.

6. The said sum of 24,369 dollars, with the maritime premium thereon, still remain (*sic*) due to the plaintiffs. By a decree made on the 10th of May, 1871, the Court pronounced for the validity of the bond, so far as regarded the ship and freight, and condemned the proceeds of the ship and freight in the amount due on the bond. The principal and premium still remain owing to the plaintiffs, and the proceeds of the said ship and her freight available for payment thereof are insufficient for such payment.

The plaintiffs claim:—

1. That the Court pronounce for the validity of the bond so far as regards the cargo:
2. That the Court condemn the defendants and their bail in so much of the amount due to the plaintiffs on the bond, for principal, maritime premium, and for interest, from the time when such principal and premium ought to have been paid, as the proceeds of the ship and freight available for payment of the bond shall be insufficient to satisfy, and in costs:
3. Such further relief as the nature of the case requires.

[Title.]

Defence.

The defendants say that the—

1. Several averments in the second article of the statement contained:

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No. 9.**

are respectively untrue, except the averment that the bottomry bond therein mentioned was given and executed.

3. (*sic*) The "Onward" proceeded on the voyage, in the first paragraph of the claim mentioned, under a charter-party made between the defendants and the owners of the vessel, who resided at New York. And the cargo, in the said paragraph mentioned, belonged to the defendants, and was shipped at Moulmein. by Messieurs T., F., and Company, of Moulmein, consigned to the defendants.

4. When the "Onward" put into Port Louis, the master placed his ship in the hands of Messieurs H. and Company, the persons in the second paragraph of the claim mentioned, and the repairs and disbursements in the said second article mentioned were made, directed, and expended, under the orders, management, and on the credit of the said Messieurs H. and Company, who at the outset contemplated the necessity of securing themselves by the hypothecation of the ship, freight, and cargo.

5. The master of the "Onward" and Messieurs H. and Company did not communicate to the said shippers of the cargo, or to the defendants, who carried on business at Glasgow, as the master knew, the intention of hypothecating the ship, freight, and cargo, or the circumstances which might render such hypothecation advisable or necessary, but, on the contrary, without reasonable cause or excuse, abstained from so doing, although the comparatively small value of the ship and freight to be earned, rendered it all the more important that such communication should have been made.

6. A reasonable and proper time was not allowed to elapse between the advertisements for the bottomry loan and the acceptance of Messieurs H. and Company's offer to make such loan.

[*Title.*]

Reply.

1. The plaintiffs say that the defendants, since the 31st day of December, 1868, have been the only persons forming the firm of T., F., and Co., of Moulmein, mentioned in the third paragraph of the defence.

2. After the master of the "Onward" put into Port Louis as aforesaid, he employed Messieurs H. and Company, in the claim mentioned, as his agents, and, by his directions, they, by letter, communicated to the defendants' firms at Moulmein and Glasgow the circumstances of the ship's distress, and the estimated amount of her repairs.

3. The said Messieurs H. and Company, shortly after the said ship was put into their hands at Port Louis, offered the said master, in case he should require them to do so, to make the necessary advances for the ship's repairs, and to take his draft at 90 days' sight on Messrs. B. Brothers, of London, at the rate of 5 per cent. discount for the amount of the advances, together with a bottomry bond on ship, cargo, and freight, as collateral

security, the bond to be void should the draft be accepted. The said master, and the said Messieurs H. and Company, by letter, communicated to the owners of the "Onward" the circumstances of the said ship's distress, and the aforesaid offer of the said Messieurs H. and Company, and the said master by his letter requested the said owners to give him their directions on the subject. The said owners shortly after receiving such letters, by letter communicated with the defendants at Glasgow, and forwarded to them copies of the said lastly-mentioned letters of the said master, and of the said Messieurs H. and Co.

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No. 9.

4. The defendants' houses at Moulmein and Glasgow respectively received the letters referred to in the second paragraph of this reply, in time to have communicated with the said master at Port Louis before the giving of the said bottomry bond.

5. The defendants received the said copies of letters referred to in paragraph 4 of this reply, in time for them to have communicated thereon with the said master at Port Louis before the giving of the said bond.

6. The defendants did not at any time answer the said communications of the said Messieurs H. and Company, or in any way communicate or attempt to communicate with the said master, or to direct him not to give, or to prevent him from giving the said bottomry bond on the said cargo.

7. The said bond was duly advertised for sale, and was subsequently, and after a proper interval had elapsed, sold by auction in the usual way. There were several bidders at the sale, and the said Messieurs H. and Company were the lowest bidders in premium, and the said bond was knocked down to them. The said bond was not advertised for until the said ship was ready for sea, and up to that time the master of the said ship had expected to hear from her owners, and had hoped to be put in funds, and had not finally determined to resort to bottomry of the said ship, or her cargo, or freight.

8. Save as herein appears, the plaintiffs deny the truth of the several allegations contained in the said Answer.

[*Note.*—The facts stated in THIS reply should, in general, be INTRODUCED BY AMENDMENT INTO THE STATEMENT OF CLAIM.]*

[*Title.*]

Rejoinder.

The defendants join issue upon the plaintiffs' reply.

* In *Earp v. Henderson*, 3 Ch. D., 254; 34 L. T., 844, Bacon, V.C., appears to have cited this note as if it ran thus:—"The facts [which under the old system of pleading would have been] stated in reply, should now, in general, be introduced by amendment into the statement of claim." Baggallay, L.J., however, in *Hall v. Eve*, 4 Ch. D., 341; 46 L. J. (Ch.), 145; 35 L. T., 735; 25 W. R., 177, pointed out that the note did not lay down any universal proposition; it only intimated that the facts stated in THIS reply should in general be introduced by amendment into the statement of claim.

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No. 10.

No. 10.

CHARTER PARTY

187 . B. No.

In the High Court of Justice,
• Division.

Writ issued 3rd August, 1876.

Between *A.B. and C.D.* - - - plaintiffs,
and
E.F. and G.H. - - - defendants.

Statement of Claim.

1. The plaintiffs were, on the 1st August, 1874, the owners of the steamship "British Queen."

2. On the 1st August, 1874, the ship being then in Calcutta, a charter-party was there entered into between John Smith, the master, on behalf of himself and the owners of the said ship, of the one part, and the defendants of the other part.

3. By the said charter-party it was agreed, amongst other things, that the defendants should be entitled to the whole carrying power of the said steamship for the period of four months certain, commencing from the said 1st August, 1874, upon a voyage or voyages between Calcutta and Mauritius and back; that the defendants should pay for such use of the said steamship to the plaintiffs' agents at Calcutta, monthly, the sum of £1,000; that the charter should terminate at Calcutta; and that if at the expiration of the said period of four months the said steamship should be upon a voyage, then the defendants should pay *pro ratâ* for the hire of the ship up to her arrival at Calcutta, and the complete discharge of her cargo there.

4. The "British Queen" made several voyages in pursuance of the said charter-party, and the first three monthly sums of £1,000 each were duly paid.

5. The period of four months expired on the 1st December, 1874, and at that time the steamship was on a voyage from Mauritius to Calcutta. She arrived at Calcutta on the 13th December, and the discharge of her cargo there was completed on the 16th December, 1874.

6. The plaintiffs' agents at Calcutta called upon the defendants to pay to them the fourth monthly sum of £1,000, and a sum of £500 for the hire of the steamship from the 1st to the 16th December, 1874, but the defendants have not paid any part of the said sums.

The plaintiffs claim—

The sum of £1,500, and interest upon £1,000, part thereof, from the 1st December, 1874, until judgment.

• Queen's Bench, Common Pleas, or Exchequer.

The plaintiffs propose that this action should be tried in London.

[Title.]

Appendix C,
No. 10.

Statement of Defence.

1. By the charter-party sued upon it was expressly provided that if any accident should happen to, or any repairs should become necessary to the engines or boilers of the said steamship, the time occupied in repairs should be deducted from the period of the said charter, and a proportionate reduction in the charter money should be made.

2. On the repairs became necessary to the engines and boilers of the steamship, and ten days were occupied in effecting such repairs.

3. On the an accident happened to the engines of the steamship at Mauritius, and two days were occupied in effecting the repairs necessary in consequence thereof.

4. The defendants are therefore entitled to a reduction in the charter money of £400.

Counter-claim.

By way of set-off and counter-claim the defendants claim as follows* :—

5. By the charter-party it was expressly provided that the charterers should furnish funds for the steamship's necessary disbursements, except in the port of Calcutta, without any commission or interest on any sum so advanced.

6. The defendants paid for the necessary disbursements of the ship in the port of Mauritius between the and the , 1874, sums amounting in all to £625. 14s. 6d.

7. The charter-party also contained an express warranty that the steamship was at the date thereof capable of steaming nine knots an hour on a consumption of 30 tons of coal a day, and it was further provided by the charter-party that the charterers should provide coal for the use of the said steamship.

8. The steamship was at the date of the charter-party only capable of steaming less than eight knots an hour, and that only on a consumption of more than 35 tons of coal a day.

9. In consequence of the matters mentioned in the last paragraph, the steamship finally arrived at Calcutta at least 15 days later, and remained under charter at least 15 days longer, than she would otherwise have done. She was also, during the whole period of the said charter, at sea for a much larger number of days than she would otherwise have been, and consumed

* By Order XIX., Rule 10, "where any defendant seeks to rely upon any facts as supporting a right of set-off or counter-claim, he shall, in his statement of defence, state specifically that he does so by way of set-off or counter-claim."

**Appendix C,
No. 10.**

a much larger quantity of coal on each of such days than she would otherwise have done, whereby the defendants were obliged to provide for the use of the steamship much larger quantities of coal than they would otherwise have been.

The defendants claim—

£ damages in respect of the matters stated in this set-off and counter-claim.

[*Title.*]

Reply.

1. The plaintiffs join issue upon the second, third, and fourth paragraphs of the defendants' statement of defence.

2. With respect to the alleged set-off stated in paragraph 6, the plaintiffs do not admit the correctness of the amount therein stated. And all sums advanced by them for disbursements were paid or allowed to them by the plaintiffs by deducting the amount thereof from the third monthly sum of £1,000, paid (subject to such deduction) to the plaintiffs' agents at Calcutta by the defendants on or about the 12th November, 1874.

3. With respect to the alleged breach of warranty and the alleged damages therefrom stated in the 7th, 8th, and 9th paragraphs, the plaintiffs say that the steamship was at the date of the charter-party capable of steaming nine knots an hour on a consumption of 30 tons of coal a day. If the steamship did not, during the said charter, steam more than eight knots an hour, and that on a consumption of more than 35 tons a day, as alleged (which the plaintiffs do not admit), it was in consequence of the bad and unfit quality of the coals provided by the defendants for the ship's use.*

[*Title.*]

Rejoinder.†

The defendants join issue upon the plaintiffs' reply to their set-off and counter-claim.

* The reply here combines a general traverse of the statement of defence with a reply specially to the set-off and counter-claim. By Order XIX., Rule 20, "it shall not be sufficient to deny generally the facts alleged in a defence by way of counter-claim." The effect of joining issue generally on the set-off and counter-claim, would be to let in Order XIX., Rule 17, and be tantamount to an admission of the facts alleged by the defendant in his set-off and counter-claim. *Rolfe v. Maclaren*, 3 Ch. D., 196; 24 W. R., 816.

† This rejoinder is rendered necessary by the defendant's set-off and counter-claim. No leave for it is required. Order XXIV., Rule 2.

No. 11.
COLLISION.

Appendix C,
No. 11.

187 . B. No.

In the High Court of Justice,
Admiralty Division.

Writ issued [].

THE "AMERICAN."

Between *A.B.* and *C.D.* - - - - plaintiffs,

and

E.F. and *G.H.* - - - - defendants.

Statement of Claim.

1. Shortly before 8 a.m. on the 9th of December, 1874, the brigantine "Katie," of 194 tons register, of which the plaintiffs were owners, manned by a crew of eight hands all told, whilst on a voyage from Dublin to St. John's, Newfoundland, in ballast, was in latitude about 46° N., and longitude 40° 42' W., by account.

2. The wind at such time was about W. by S., a strong breeze, and the weather was clear, and the "Katie" was under double-reefed mainsail, reefed mainstaysail, middle staysail, lower topsail, reefed fore staysail, and jib, sailing full and by on the port tack, heading about N.W. $\frac{1}{2}$ N., and proceeding at the rate of about five knots and a half per hour.

3. At such time a steamship under steam and sail, which proved to be the screw steamship "American," was seen at the distance of three or four miles from the "Katie," broad on her port bow, and steering about E. or E. by S. The master of the "Katie" not having been able to take observations for several days, and her chronometer having run down, and the said master wishing to exchange longitudes with the "American," caused an ensign to be hoisted, and marked his longitude by account on a board, which he exhibited over the port side. The "Katie" was kept full and by, and the "American" approached rapidly, and attempted to pass ahead of the "Katie," and caused immediate danger of collision, and although thereupon the helm of the "Katie" was put hard a-port and her mainsheet let go, the "American" with her stem struck the "Katie" on her port side, almost amidships, cutting her nearly in two, and the "Katie" sank almost immediately, her crew being saved by the steamer.

4. The "American" improperly neglected to keep clear of the "Katie."

5. The "American" improperly attempted to pass ahead of the "Katie."

6. The "American" improperly neglected to ease her engines, and improperly neglected to stop and reverse her engines in due time.

**Appendix C,
No. 11.**

The plaintiff claims:—

1. That it may be declared that the plaintiffs are entitled to the damage proceeded for;
2. That the bail given by the defendants be condemned in such damage, and in costs:
3. That the accounts and vouchers relating to such damage be referred to the Registrar assisted by merchants to report the amount thereof:
4. Such further and other relief as the nature of the case may require.

[Title.]

Statement of Defence.

The defendants say as follows:—

1. The "American" is a screw steamship, of 1,368 tons register with engines of 200-horse power nominal, belonging to the port of Liverpool, and at the time of the occurrences hereinafter mentioned was manned by a crew of 40 hands all told, laden with a cargo of general merchandise, and bound from Port-au-Prince in the West Indies to Liverpool.

2. About 8.5 a.m. on the 28th of November, 1874, the "American" was in latitude 46° N., longitude 38° 16' W., steering E. by S. true magnetic, making under all sail and steam about 12 knots an hour, the wind being about S.W. by S. true magnetic, blowing a strong breeze and the weather hazy, when a vessel, which afterwards proved to be the brigantine "Katie," was observed on the "American's" starboard bow about four miles distant, bearing about S.E. by E. true magnetic, close-hauled to the wind, and steering a course nearly parallel to that of the "American."

3. The "American" kept her course, and when the "Katie" was about three miles distant her ensign was observed by those on board the "American" run up to the main, and she was seen to have altered her course, and to be bearing down towards the "American." The "American's" ensign was afterwards run up, and her master, supposing that the "Katie" wanted to correct her longitude, or to speak the "American," continued on his course expecting that the "Katie," when she had got sufficiently close to speak or show her black board over her starboard side, would luff to the wind, and pass to windward of the "American."

4. The master of the "American" watched the "Katie" as she continued to approach the "American," and when she had approached as near as he deemed it prudent for her to come, he waved to her to luff, and shortly afterwards, on his observing her to be attempting to cross the bows of the "American," the helm of the latter was immediately put to starboard, and engines stopped and reversed full speed; but notwithstanding, the "American" with her stem came into collision with the port side of the "Katie," a little forward of the main rigging.

5. The "American's" engines were then stopped, and when the crew of the "Katie" had got on board of the "American," the latter's engines were reversed to get her clear of the "Katie," which sunk under the "American's" bows. Appendix C,
No. 11.

6. The "Katie" improperly approached too close to the "American."

7. Those on board the "Katie" improperly neglected to luff, and to pass to windward of the "American."

8. Those on board the "Katie" improperly attempted to cross the bows of the "American."

9. Those on board the "Katie" improperly ported her helm before the said collision.

10. Those on board the "Katie" improperly neglected to starboard her helm before the said collision.

[Title.]

Reply.

The plaintiffs join issue upon the defendants' statement of defence.

No. 12.

EQUIPMENT OF SHIP.

187

B. No.

In the High Court of Justice,
Admiralty Division.

Writ issued []

THE "TWO ELLENS."

Between A.B. and C.D. - - - plaintiffs,
and

E.F. - - - defendant.

Statement of Claim.

1. The said vessel was and is a British Colonial vessel, belonging to the Port of Digby, in Nova Scotia, of which no owner or part owner was at the time of the commencement of this action or is domiciled in England or Wales.

2. At the time of the commencement of this action the said vessel was under arrest of this Court.

3. About the month of February, 1868, the said vessel was lying in the Port of London, in need of repairs, and of being equipped and supplied with certain other necessities.

4. By the order of Messrs. K. L., who were duly authorised, the plaintiffs equipped and repaired the said vessel as she needed, and provided the vessel with necessities, and there is now due to the plaintiffs for such necessary repairing and equipping, and other necessities, the sum

Appendix C, of £305. 3s., together with interest thereon from the 19th day of
No. 12. February, 1868.

The plaintiffs claim :

1. Judgment for the said sum of £305. 3s., with such interest thereon as aforesaid until judgment :
2. The condemnation of the ship and the defendant and his bail therein and in the costs of this suit :
3. Such further relief as the nature of the case requires.

[Title.]

Statement of Defence.

1. By an instrument of mortgage, in the form and recorded as prescribed by the Merchant Shipping Act, 1854, bearing date the 9th of March, 1867, and executed by C. M., blacksmith., D. F., master mariner, and W. H., farmer, all of Weymouth, in the county of Digby, in Nova Scotia, the registered owners of 64/64th parts or shares in the vessel, the said C. M., D. F., and W. H. mortgaged 64/64th parts or shares in the vessel, of which the said D. F. was also master, to G. T., of Nova Scotia, in consideration of the sum of 5,000 dollars advanced by him to the said owners, and for the purpose of securing the repayment by them to him of the said sum with interest thereon.

2. By an instrument of transfer, dated the 16th of July, 1868, in the form prescribed by the said Act, and executed by G. T., in consideration of the sum of 5,000 dollars to G. T. paid by the defendant, G. T. transferred to the defendant the mortgage security.

3. The said sum of 5,000 dollars, with interest thereon, still remains due on the said security.

4. The vessel was not under the arrest of this Court at the time of the commencement of this action.

5. The vessel did not need to be equipped or repaired as in the fourth paragraph of the plaintiffs' claim mentioned, and she did not at the time of the supply of the articles referred to in the said fourth paragraph as "necessaries" stand in need of such articles. On the contrary, the said vessel could have gone to sea and proceeded on and prosecuted her voyage without such equipments, repairs, and articles referred to as aforesaid, and such equipments, repairs, and other articles were done and effected and supplied for the purpose of reclassing the said vessel, and not for any other purpose; and the claim of the plaintiffs is not a claim for necessaries within the meaning of the Admiralty Court Act, 1861, s. 5.

6. The alleged necessaries were not supplied on the credit of the said vessel, but upon the personal credit of J. B., who was the broker for the vessel, and upon the agreement that the plaintiffs were not to have recourse to the vessel.

7. The defendant did not, nor did G. T., in any way order, authorise, or become liable for, and neither of them is in any way liable in respect of the said alleged supplies or any part thereof, and the said vessel was at the time of the commencement of this action and she still is of a less value than the amount which, irrespective of the sums referred to in the next article of this Answer, is due to the defendant on the said mortgage security. Appendix C,
No. 12.

8. The defendant, in order to save the vessel from being sold by this Court at the instance of certain of her mariners having liens on the said vessel for their wages, has been compelled to pay the said wages, and he claims, if necessary, to be entitled to stand in the place of such mariners, or to add the amounts so paid by him for wages to the amount secured by the said mortgage, and to have priority in respect thereof over the claim of the plaintiffs.

[*Title.*]

Reply.

1. The plaintiffs admit that 64/64th shares in the said ship the "Two Ellens" were on or about the 9th day of March, 1867, mortgaged by the said C. M., D. F., and W. H., all of Weymouth, in the county of Digby, Nova Scotia, to the said G. T.

2. Save as afore-mentioned, all the several averments in the said Answer contained are respectively untrue.

3. If there was or is any such instrument of transfer as is mentioned in the second article of the said Answer, the same has never been registered according to the provisions of the Merchant Shipping Act, 1854.

4. The said G. T. has never been domiciled in or resided in the United Kingdom, and is now resident in Nova Scotia, and the registered owners of the said vessel in the first paragraph of the said Defence mentioned were always and are domiciled in Nova Scotia, and resident out of the United Kingdom.*

[*Title.*]

Rejoinder.

The defendant joins issue upon the third and fourth paragraphs of the Reply.†

* See *Hall v. Eve*, 4 Ch. D., 46; 46 L. J. (Ch.), 145; 25 W. R., 177; 35 L. T., 735.

† This rejoinder is rendered necessary by the special reply.

Appendix C,
No. 13.

No. 13.

FALSE IMPRISONMENT.

187 . B. No.

In the High Court of Justice,
• Division.

Writ issued 3rd August, 1876.

Between *A.B.* - - - - - plaintiff,
and
E.F. - - - - - defendant.

Statement of Claim.

1. The plaintiff is a journeyman painter. The defendant is a builder, having his building yard, and carrying on business at and for six months before and up to the 22nd August, 187 , the plaintiff was in the defendant's employment as a journeyman painter.

2. On the said 22nd August, 187 , the plaintiff came to work as usual in the defendant's yard, at about six o'clock in the morning.

3. A few minutes after the plaintiff had so come to work the defendant's foreman *X.Y.*, who was then in the yard, called the plaintiff to him, and accused the plaintiff of having on the previous day stolen a quantity of paint, the property of the defendant, from the yard. The plaintiff denied the charge, but *X.Y.* gave the plaintiff into the custody of a constable, whom he had previously sent for, upon a charge of stealing paint.

4. The defendant was present at the time when the plaintiff was given into custody, and authorised and assented to his being so given into custody; and in any case, *X.Y.*, in giving him into custody, was acting within the scope and in the course of his employment as the defendant's foreman, and for the purposes of the defendant's business.

5. The plaintiff upon being so given into custody, was taken by the said constable a considerable distance through various streets, on foot, to the police station, and he was there detained in a cell till late in the same afternoon, when he was taken to the police Court, and the charge against him was heard before the magistrate then sitting there, and was dismissed.

6. In consequence of being so given into custody, the plaintiff suffered annoyance and disgrace, and loss of time and wages, and loss of credit and reputation, and was thereby unable to obtain any employment or earn any wages for three months.

The plaintiff claims £ damages.

The plaintiff proposes that this action should be tried in Middlesex.†

* Queen's Bench, Common Pleas or Exchequer.

† This seems unnecessary. See Order XXXVI., Rule 1.

[Title.]

Statement of Defence.

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No. 13.

1. The defendant denies that he was present at the time when the plaintiff was given into custody, or that he in any way authorised or assented to his being given into custody. And the said X.Y., in giving the plaintiff into custody, did not act within the scope or in the course of his employment as the defendant's foreman, or for the purposes of the defendant's business.

2. At some time about five or six o'clock on the being the evening before the plaintiff was given into custody, a large quantity of paint had been feloniously stolen by some person or persons from a shed upon the defendant's yard and premises.

3. At about 5.30 o'clock on the evening of the the plaintiff, who had left work about half an hour previously, was seen coming out of the shed when no one else was in it, although his work lay in a distant part of the yard from and he had no business in or near the shed. He was then seen to go to the back of a stack of timber in another part of the yard. Shortly afterwards the paint was found to have been stolen, and it was found concealed at the back of the stack of timber behind which the plaintiff had been seen to go.

4. On the following morning, before the plaintiff was given into custody, he was asked by X.Y. what he had been in the shed and behind the stack of timber for, and he denied having been in either place. X.Y. had reasonable and probable cause for suspecting, and did suspect that the plaintiff was the person who had stolen the paint, and thereupon gave him into custody.

[Title.]

Reply.

The plaintiff joins issue upon the defendant's statement of defence.

No. 14.

FORECLOSURE.

1876. W. No. 672.

In the High Court of Justice,
Chancery Division.*

[Name of Judge.]

Writ issued []

Between R. W. - - - - - plaintiff,
and

O. S. and J. B. - - - - - defendants.

Statement of Claim.

1. By an indenture dated the 25th of March, 1876, made between the

* See s. 34 of the Principal Act, *supra*.

defendant O. S. of the one part, and the plaintiff of the other part, the defendant O. S., in consideration of the sum of £10,000 paid to him by the plaintiff, conveyed to the plaintiff and his heirs a farm containing 398 acres, situate in the parish of B., in the county of D., with all the coal mines, seams of coal, and other mines and minerals in and under the same, subject to a proviso for a redemption of the same premises on payment by the defendant O. S., his heirs, executors, administrators, or assigns, to the plaintiff, his executors, administrators, or assigns, of the sum of £10,000, with interest for the same in the meantime at the rate of £4 per cent. per annum, on the 25th day of September then next.

2. By an indenture dated the 1st day of April, 1867, made between the defendant O. S. of the one part, and the defendant J. B. of the other part, the defendant O. S. conveyed to the defendant J. B. and his heirs the hereditaments comprised in the hereinbefore stated security of the plaintiff, or some parts thereof, subject to the plaintiff's said security, and subject to a proviso for redemption of the same premises on payment by the defendant O. S., his heirs, executors, administrators, or assigns, to the defendant J. B., his executors, administrators, or assigns, of the sum of £15,000, with interest for the same in the meantime at the rate of £5 per cent. per annum.

3. The whole of the said sum of £10,000, with an arrear of interest thereon, remains due to the plaintiff on his said security.

The plaintiff claims as follows:—

1. That an account may be taken of what is due to the plaintiff for principal money and interest on his said security, and that the defendants may be decreed to pay to the plaintiff what shall be found due to him on taking such account, together with his costs of this action, by a day to be appointed by the Court, the plaintiff being ready and willing, and hereby offering, upon being paid his principal money, interest, and costs, at such appointed time, to convey the said mortgaged premises as the Court shall direct.
2. That in default of such payment the defendants may be foreclosed of the equity of redemption in the mortgaged premises.
3. Such further or other relief as the nature of the case may require.

1876. W. 672.

**In the High Court of Justice,
Chancery Division.**

[Name of Judge.)

Between R. W. - - - - - plaintiff,
 and

O. S. and J. B. - - - - defendants,
 (by original action)

COURT OF JUDICATURE ACTS, 1873 AND 1875. 841

And between the said O. S. - - - - plaintiff,
and
The said R. W., and J. B., and J. W. - defendants,
(by counter-claim).*

Appendix C,
No. 14.

The Defence and Counter-claim of the above-named O. S. †

1. This defendant does not admit that the contents of the indenture of the 25th day of March, 1867, in the plaintiff's statement of complaint mentioned, are correctly stated therein.

2. The indenture of the 1st day of April, 1867, in the statement of claim mentioned, was not a security for the sum of £15,000, and interest at £5 per cent. per annum, but for the sum of £14,000 only, with interest at the rate of £4. 10s. per cent. per annum.

3. This defendant submits that under the circumstances in his counter-claim mentioned, the said indentures of the 25th day of March, 1867, and the 1st day of April, 1867, did not create any effectual security upon the mines and minerals in and under the lands in the same indentures comprised, and that the same mines and minerals ought to be treated as excepted out of the said securities.

And by way of counter-claim this defendant states as follows‡:—

1. At the time of the execution of the indenture next hereinafter stated, J. C. A. was seized in fee simple in possession of the land described in the said indentures, and the mines and minerals in and under the same.
2. By indenture dated the 24th of March, 1860, made between the said J. C. A. of the first part, E. his wife, then E. S., spinster, of the second part, and this defendant and the above-named J. W. of the third part, being a settlement made in contemplation of the marriage, shortly after solemnized, between the said J. C. A. and his said wife, the said J. C. A. granted to this defendant and the said J. W., and their heirs, all the coal mines, beds of coal, and other the mines and minerals under the said lands, with such powers and privileges as in the now-stating indenture mentioned, for the purpose of winning, working, and getting the same mines and minerals, to hold the same premises to this defendant and the said J. W. and their heirs to the use of the said J. C. A., his heirs

* By Order XXII., Rule 4, "Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff, along with any other person or persons, he shall add to the title of his defence a further title, similar to the title in a statement of complaint, setting forth the names of all persons who, if such counter-claim were to be enforced by cross action, would be defendants to such cross action."

† See Order XIX., Rule 10, *supra*.

‡ See *Ib*.

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No. 14.**

- and assigns, till the solemnization of the said marriage, and after the solemnization thereof to the use of this defendant and the said J. W., their executors and administrators, for the term of 500 years, from the day of the date of the now-stating indenture, upon the trusts therein mentioned, being trusts for the benefit of the said J. C. A. and his wife and the children of their marriage, and from and after the expiration or other determination of the said term of 500 years, and, in the meantime, subject thereto, to the use of the said J. C. A., his heirs and assigns for ever.
3. By indenture dated the 12th of May, 1860, made between the said J. C. A. of the one part, and W. N. of the other part, the said J. C. A. granted to the said W. N. and his heirs the said lands, except the coal mines, beds of coal, and other mines and minerals thereunder, to hold the same premises unto and to the use of the said W. N., his heirs and assigns for ever, by way of mortgage, for securing the payment to the said W. N., his executors, administrators, or assigns, of the sum of £26,000 with interest as therein mentioned.
 4. On the 14th of January, 1864, the said J. C. A. was adjudicated a bankrupt, and shortly afterwards J. L. was appointed creditors' assignee of his estate.
 5. Some time after the said bankruptcy, the said W. N., under a power of sale in his said mortgage deed, contracted with this defendant for the absolute sale to this defendant of the property comprised in his said security for an estate in fee simple in possession, free from incumbrances, for the sum of £26,000, and the said J. L., as such assignee as aforesaid, agreed to join in the conveyance to this defendant for the purpose of signifying his assent to such sale.
 6. By indenture dated the 1st of September, 1866, made between the said W. N. of the first part, the said J. L. of the second part, the said J. C. A. of the third part, and this defendant of the fourth part, reciting the said agreement for sale, and reciting that the said J. L., being satisfied that the said sum of £26,000 was a proper price, had, with the sanction of the Court of Bankruptcy, agreed to confirm the said sale, it was witnessed that in consideration of the sum of £26,000, with the privity and approbation of the said J. L., paid by this defendant to the said W. N., he the said W. N. granted, and the said J. C. A. ratified and confirmed to this defendant and his heirs, all the hereditaments comprised in the said security of the 12th day of May, 1860, with their rights, members, and appurtenances, and all the estate, right, title, and interest of them, the said W. N. and J. C. A. therein, to hold the same premises unto and to the use of this defendant, his heirs and assigns for ever.
 7. The sale to this defendant was not intended to include anything not

included in the security of the 12th of May, 1860, and the said J. L. only concurred therein to signify his approval of the said sale, and did not purport to convey any estate vested in him; and the lastly hereinbefore stated indenture did not vest in this defendant any estate in the said mines and minerals.

8. The plaintiff and the defendant J. B. respectively had before they advanced to this defendant the moneys lent by them on their securities in the plaintiff's claim mentioned, full notice that the mines and minerals under the said lands did not belong to this defendant. This fact appeared on the abstracts of title delivered to them before the preparation of their said securities. A valuation of the property made by a surveyor was furnished to them respectively on behalf of this defendant before they agreed to advance their money on their securities; but although the said lands are in a mineral district, the mines and minerals were omitted from such valuation, and they respectively knew at the time of taking their said securities that the same did not include any interest in the mines and minerals.

9. At the time when the securities of the plaintiff and the defendant J. B. were respectively executed, the plaintiff and the defendant J. B. respectively had notice of the said indenture of settlement of the 24th day of March, 1860.

10. At the time when the plaintiff's security was executed, the mines and minerals under the said lands, with such powers and privileges as aforesaid, were vested in this defendant and the said J. W. for the residue of the said term of 500 years, and subject to the said term, the inheritance in the same mines, minerals, powers and privileges was vested in the said J. L. as such assignee as aforesaid.

11. The said security to the plaintiff was by mistake framed so as to purport to include the mines and minerals under the said lands, and by virtue thereof the legal estate in moiety of the said mines and minerals became and now is vested in the plaintiff for the residue of the said term of 500 years.

The defendant O. S. claims as follows:

1. That it may be declared that neither the plaintiff nor the defendant J. B. has any charge or lien upon that one undivided moiety, which in manner aforesaid became vested in the plaintiff for the residue of the said term of 500 years, of and in the mines and minerals in and under the lands mentioned in the plaintiff's said security.

2. That it may be declared that the said mines and minerals, rights, and privileges which by the said indenture of settlement were vested in the defendant O. S. and the said J. W. for the said term of 500 years, upon trust as therein mentioned, ought to be so conveyed and assured as that the same may become vested in the

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No. 14.**

defendant O. S. and the said J. W. for all the residue of the said term upon the trusts of the said settlement.

3. That the said R. W. and J. W. may be decreed to execute all such assurances as may be necessary for giving effect to the declaration secondly hereinbefore prayed.
4. To have such further or other relief as the nature of the case may require.

1876. W. 672.

In the High Court of Justice,
Chancery Division.

[*Name of Judge.*]

Between R. W. - - - - - plaintiff,
and
O. S. and J. B. - - - - - defendants,
(by original action)
And between the said O. S. - - - - - plaintiff,
and
The said R. W., and J. B., and J. W. - defendants.
(by counter-claim.)

The Reply of the Plaintiff R. W.

1. The plaintiff joins issue with the defendants upon their several defences, and in reply to the statements alleged by the defendant O. S., by way of counter-claim, the plaintiff says as follows:

1. The plaintiff does not admit the execution of any such indenture as is stated in the said counter-claim to bear date the 24th of March, 1860.
2. The plaintiff does not admit that the indenture of the 12th of May, 1860, is stated correctly in the statement of claim.
3. When the defendant O. S., in the year 1866, applied to the plaintiff to advance him the sum of £10,000, he offered to the plaintiff as a security the lands which were afterwards comprised in the indenture of the 25th of March, 1867, including the mines and minerals which he now alleges were not to form part of the security, and the plaintiff agreed to lend the said sum upon the security of the said lands, including such mines and minerals. During the negotiation for the said loan a valuation of the property to be included in the mortgage was delivered to the plaintiff on behalf of the said defendant. Such valuation included the mines and minerals; and the plaintiff consented to make the loan on the faith of such valuation. The plaintiff did not know when he took his security that it did not include any interest in the said mines and minerals; on the contrary, he believed that the entirety of such mines and minerals was to be included therein.

4. The plaintiff does not admit the contents of the indenture of the 1st of September, 1866, to be as alleged, or that it was so framed as not to include the said mines and minerals, or that it was not intended to include anything not included in the security of the 12th of May, 1860, or that J. L., in the counter-claim named, only concurred therein to signify his approval of the said sale, and did not purport to convey any estate vested in him.
5. Save so far as the plaintiff's solicitor may have had notice by means of the abstract of title that the mines and minerals under the said lands did not belong to the defendant O. S., the plaintiff had not any notice thereof, and he does not admit that it appeared from the abstract of title that such was the case. The mines were not omitted from any valuation delivered to the plaintiff as mentioned in the counter-claim.
6. The plaintiff admits that when he took his security he was aware that there was indorsed on the deed by which the said lands were conveyed by J. C. A., in the counter-claim named, a notice of a settlement of 24th March, 1860, but he had no further or other notice thereof, and though his solicitor inquired after such settlement, none was ever produced.
7. The plaintiff submits that if it shall appear that no further interest in the said mines and minerals was conveyed to him by his said security than one undivided moiety of a term of 500 years therein, as alleged by the said counter-claim, such interest is effectually included in the plaintiff's said security, and that he is entitled to foreclose the same.

No. 15.

FRAUD.*

187 . B. No.

In the High Court of Justice,

† Division.

Writ issued 3rd August, 1876.

Between *A.B.* - - - - - plaintiff,
and
E.F. - - - - - defendant.

Statement of Claim.

1. In or about March, 1875, the defendant caused to be inserted in the *Daily Telegraph* Newspaper an advertisement, in which he offered for sale the lease, fixtures, fittings, goodwill, and stock-in-trade of a baker's shop and business, and described the same as an in-

* "False representations" would be a more appropriate heading.

† Queen's Bench, Common Pleas, or Exchequer.

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creasing business, and doing twelve sacks a week. The advertisement directed application for particulars to be made to X.Y.

2. The plaintiff having seen the advertisement applied to X.Y., who placed him in communication with the defendant, and negotiations ensued between the plaintiff and the defendant for the sale to the plaintiff of the defendant's bakery at with the lease, fixtures, fittings, stock-in-trade, and goodwill.

3. In the course of these negotiations the defendant repeatedly stated to the plaintiff that the business was a steadily increasing business, and that it was a business of more than twelve sacks a week.

4. On the 5th of April, 1875, the plaintiff, believing the said statements of the defendant to be true, agreed to purchase the said premises from the defendant for £500, and paid to him a deposit of £200 in respect of the purchase.

5. On the 15th April the purchase was completed, an assignment of the lease executed, and the balance of the purchase-money paid. On the same day the plaintiff entered into possession.

6. The plaintiff soon afterwards discovered that at the time of the negotiations for the said purchase by him and of the said agreement, and of the completion thereof, the said business was and had long been a declining business; and at each of those times, and for a long time before, it had never been a business of more than eight sacks a week. And the said premises were not of the value of £500, or of any saleable value whatever.

7. The defendant made the false representations hereinbefore mentioned, well knowing them to be false, and fraudulently, with the intention of inducing the plaintiff to make the said purchase on the faith of them.

The plaintiff claims £ damages.

[Title.]

Statement of Defence.

1. The defendant says that at the time when he made the representations mentioned in the third paragraph of the statement of claim and throughout the whole of the transactions between the plaintiff and defendant, and down to the completion of the purchase and the relinquishment by the defendant of the said shop and business to the plaintiff, the said business was an increasing business, and was a business of over twelve sacks a week. And the defendant denies the allegations of the 6th paragraph of the statement of claim.

2. The defendant repeatedly during the negotiations told the plaintiff that he must not act upon any statement or representation of his, but must ascertain for himself the extent and value of the said business.

And the defendant handed to the plaintiff for this purpose the whole of his books, showing fully and truthfully all the details of the said business and from which the nature, extent, and value thereof could be fully seen, and those books were examined for that purpose by the plaintiff, and by an accountant on his behalf. And the plaintiff made the purchase in reliance upon his own judgment, and the result of his own inquiries and investigations, and not upon any statement or representation whatever of the defendant.

Appendix C,
No. 15.

[*Title.*]

Reply.

The plaintiff joins issue upon the defendant's statement of defence.

No. 16.

GUARANTEE.

In the High Court of Justice,
* Division.

187 . B. No.

Writ issued 3rd August, 1876.

Between *A.B.* and *C.D.* - - - - plaintiffs,
and
E.F. and *G.H.* - - - - defendants.

Statement of Claim.

1. The plaintiffs are brewers, carrying on their business at under the firm of *X. Y. & Co.*
2. In the month of March, 1872, *M.N.* was desirous of entering into the employment of the plaintiffs as a traveller and collector, and it was agreed between the plaintiffs and the defendants and *M.N.* that the plaintiffs should employ *M.N.* upon the defendants entering into the guarantee hereinafter mentioned.
3. An agreement in writing was accordingly made and entered into, on or about the 30th March, 1872, between the plaintiffs and the defendants, whereby in consideration that the plaintiffs would employ *M.N.* as their collector the defendants agreed that they would be answerable for the due accounting by *M.N.* to the plaintiffs for and the due payment over by him to the plaintiffs of all moneys which he should receive on their behalf as their collector.
4. The plaintiffs employed *M.N.* as their collector accordingly, and he entered upon the duties of such employment, and continued therein down to the 31st of December, 1873.
5. At various times between the 29th of September and the 25th of December, 1873, *M.N.* received on behalf of the plaintiffs and as their collector sums of money from debtors of the plaintiffs amounting in the whole to the sum of £950; and of this amount *M.N.* neglected to

* Queen's Bench, Common Pleas, or Exchequer.

Appendix C, account for or pay over to the plaintiffs sums amounting in the whole to
No. 16. £227, and appropriated the last-mentioned sums to his own use.

6. The defendants have not paid the last-mentioned sums, or any part thereof to the plaintiffs.

The plaintiffs claim:—

No. 17.

INTEREST SUIT (PROBATE).

In the High Court of Justice,
 Probate Division.

187 . B. No.

Between *A.B.* - - - - - plaintiff,

and

C.D. - - - - - defendant.

Statement of Claim.

1. *M.N.*, late of No. High Street, Putney, in the County of Surrey, grocer, deceased, died on or about the day of at No. 1, High Street, Putney, aforesaid, a widower, without child, parent, brother or sister, uncle or aunt, nephew or niece.

2. The plaintiff is the cousin-german, and one of the next of kin of the deceased.

The plaintiff claims:—

That the Court decree to him a grant of letters of administration of the personal estate and effects of the said deceased as his lawful cousin-german, and one of his next of kin.

[*Title.*]

Defence.

1. The defendant admits that *M.N.* died a widower, without child, parent, brother or sister, uncle or aunt, or niece, but he denies that he died without nephew.

2. The deceased had a brother named *G.B.*, who died in his lifetime.

3. *G.B.* was married to *E.H.* in the parish church of in the county of on the day of and had issue of such marriage, the defendant, who was born in the month of and is the nephew and next of kin of the deceased.

The defendant therefore claims:—

That the Court pronounce that he is the nephew and next of kin of the deceased, and as such entitled to a grant of letters of administration of the personal estate and effects of the deceased.

[*Title.*]

Reply.

1. The plaintiff denies that *G.B.* was married to *E.H.*

2. He also denies that the defendant is the issue of such marriage.

LANDLORD AND TENANT.

187 . B. No.

In the High Court of Justice,
* Division.

Writ issued 3rd August, 1876.

Between *A.B.* - - - - - plaintiff,
and
C.D. - - - - - defendant.

Statement of Claim.

1. On the day of the plaintiff, by deed, let to the defendant a house and premises, No. 52, Street, in the city of London, for a term of 21 years, from the day of , at the yearly rent of 120*l.*, payable quarterly.

2. By the said deed, the defendant covenanted to keep the said house and premises in good and tenantable repair.

3. The said deed also contained a clause of re-entry, entitling the plaintiff to re-enter upon the said house and premises, in case the rent thereby reserved, whether demanded or not, should be in arrear for 21 days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

4. On the 24th June, 187 , a quarter's rent became due, and on the 29th of September, 187 , another quarter's rent became due; on the 21st October, 187 , both had been in arrear for 21 days, and both are still due.

5. On the same 21st of October, 187 , the house and premises were not, and are not now in good or tenantable repair, and it would require the expenditure of a large sum of money to reinstate the same in good and tenantable repair, and the plaintiff's reversion is much depreciated in value.

The plaintiff claims:—

1. Possession of the said house and premises.

2. *£* for arrears of rent.

3. *£* damages for the defendant's breach of his covenant to repair.

4. *£* for the occupation of the house and premises, from the 29th of September, 187 , to the day of recovering possession.

The plaintiff proposes that this action should be tried in London.†

* Queen's Bench, Common Pleas, or Exchequer.

† *I.e.*, at the Guildhall, City.

**Appendix C,
No. 19.**

No. 19.
NECESSARIES FOR SHIP.

187 . B. No.

In the High Court of Justice,
Admiralty Division.

Writ issued [].

THE "ENTERPRISE."

Between *A.B.* and *C.D.* - - - plaintiffs,
and
E.F. and *G.H.* - - - defendants.

Statement of Claim.

1. The plaintiffs were at the time hereinafter stated, and are engineers and ironfounders, carrying on business at Liverpool, in the county of Lancaster.

2. In the month of January, 1872, whilst the above-named steamship "Enterprise," belonging to the port of London, was in the port of Liverpool, the plaintiffs, having received orders from the master in that behalf, executed certain necessary work to her, and supplied her with certain necessary stores and materials, and caused her to be supplied upon their credit with certain necessary work, labour, materials, and necessaries, and thereby supplied the said ship with necessaries within the meaning of the fifth section of the Admiralty Court Act, 1861.

3. There is due to the plaintiffs in respect of such supply of necessaries to the said ship the sum of £577. 2s. 6d., and the plaintiffs cannot obtain payment thereof without the assistance of the Court.

The plaintiffs claim:—

1. Judgment pronouncing for the claim of the plaintiffs:
2. The condemnation of the defendants, and their bail therein, with costs:
3. A reference, if necessary, of the claim of the plaintiffs to the registrar, assisted by assessors, to report the amount thereof:
4. Such further relief as the nature of the case requires.

[*Title.*]

Defence.

1. The defendants deny the allegations contained in the third paragraph of the statement of claim.

2. The defendants admit that the plaintiffs executed certain work to the said ship, and supplied her with certain materials, but they say that a portion of the work so executed was executed badly and insufficiently, and of the materials so supplied, some were bad and insufficient, and a portion of the work in the claim mentioned was done in and about altering and endeavouring to make good such bad and insufficient work and

materials. The defendant has paid in respect of the work and materials on the claim mentioned the sum of £356. 17s. 9d., and the said sum is sufficient to satisfy the claims of the plaintiffs.

3. The defendants deny the allegations contained in the second paragraph of the claim so far as they relate to any claim beyond the said sum of £356. 17s. 9d., and say that if the plaintiffs did execute any work or supply any materials other than the work and materials mentioned in the second paragraph of this defence such work was not necessary work, and such materials were not necessary materials, within the meaning of the fifth section of the Admiralty Court Act, 1861, and were not supplied in such circumstances as to render the defendants liable to pay the same.

[Title.]

Reply.

1. The defendants join issue upon the statement of defence.

No. 20.

NEGLIGENCE.

the High Court of Justice,
* Division.

187 B. No.

Writ issued 3rd August, 1876.

Between *A.B.* - - - - - plaintiff,
and
E.F. - - - - - defendant.

Statement of Claim.

1. The plaintiff is a shoemaker, carrying on business at

The defendant is a soap and candle manufacturer, of

2. On the 23rd May, 1875, the plaintiff was walking eastward along the south side of Fleet Street, in the city of London, about three o'clock in the afternoon. He was obliged to cross Street, which is a street running into Fleet Street at right angles on the south side. While he was crossing this street, and just before he could reach the foot pavement on the further side thereof, a two-horse van of the defendant's, under the charge and control of the defendant's servants, was negligently, suddenly, and without any warning, turned at a rapid and dangerous pace out of Fleet Street into Street. The pole of the van struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken, and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy

* Queen's Bench, Common Pleas, or Exchequer.

Appendix C, medical and other expenses, and sustained great loss of business and
No. 20. profits.

The plaintiff claims £ damages.

[Title.]

Statement of Defence.

1. The defendant denies that the van was the defendant's van, or that it was under the charge and control of the defendant's servant. The van belonged to Mr. John Smith, of , a carman and contractor employed by the defendant to carry and deliver goods for him; and the persons under whose charge and control the said van was were the servants of the said Mr. John Smith.

2. The defendant does not admit that the van was turned out of Fleet Street, either negligently, suddenly, or without warning, or at a rapid or dangerous pace.

3. The defendant says, that the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the van approaching him, and avoided any collision with it.

4. The defendant does not admit the statements of the third paragraph of the statement of claim.

[Title.]

Reply.

The plaintiff joins issue upon the defendant's statement of defence.

No. 21.

POSSESSION OF SHIP.

In the High Court of Justice,
 Admiralty Division.

187 . B. No.

Writ issued [].

THE "LADY OF THE LAKE."

Between A.B. - - - plaintiff,
 and
 E.F. - - - defendant.

Statement of Claim.

1. On or about the 15th of July, 1868, an agreement was entered into between the plaintiff and J. D., who was then the sole owner of the above-named barque "Lady of the Lake," whereby J. D. agreed to sell, and the plaintiff agreed to purchase, 32-64th parts or shares of the vessel for the sum of £500; payment £300 in cash, and the remainder by purchaser's acceptances at three and six months date, and it was thereby agreed that the plaintiff was to be commander of the vessel.

2. The plaintiff accordingly paid to J. D. the sum of £300, and gave

him his (the plaintiff's) acceptances, at three and six months' date for the residue of the said purchase-money, and J. D. by bill of sale transferred 32-64th parts or shares in the vessel to the plaintiff, which bill of sale was duly registered on the 18th of July, 1868; the plaintiff has since been and still is the registered owner of such 32-64th shares.

Appendix C,
No. 21.

3. The vessel then sailed under the plaintiff's command on a voyage from Sunderland to the Brazils and other ports, and then on a homeward voyage to Liverpool, where she arrived on the 18th of June, 1869, and having there discharged her homeward cargo, she sailed thence under the plaintiff's command with a cargo to the Tyne, and thence to Sunderland, at which port she arrived on the 9th of August, 1869.

4. The plaintiff then made several ineffectual applications to J. D. with a view to obtaining another charter for the said vessel, and after she had been lying idle for a considerable time, the plaintiff on or about the 16th of September, 1869, obtained an advantageous charter for her to proceed to Barcelona with a cargo of coals, and with a view to enabling her to execute such charter the plaintiff paid the dock dues, and moved the vessel into a slipway in order that her bottom might be cleaned, but on or about the 17th of September, whilst the vessel was on the shore adjoining the slipway, the defendant, to whom the said J. D. had in the meantime transferred his 32-64th parts, forcibly took the vessel out of the possession of the plaintiff, and refused and still refuses to allow the plaintiff to take the vessel on her said voyage to Barcelona, and by reason thereof heavy loss is being occasioned to the plaintiff.

The plaintiff claims:—

1. Judgment giving possession of the vessel "Lady of the Lake" to the plaintiff:
2. The condemnation of the defendant in costs of suit, and in all losses and damages occasioned by the defendant to the plaintiff:
3. Such further relief as the nature of the case requires.

[Title.]

Defence.

1. The defendant says that the acceptances in the second paragraph of the claim mentioned were respectively dishonoured by the plaintiff, and have never yet been paid by him.

2. It was agreed between the plaintiff and J. D., that J. D. should act, and he has since always acted, as ship's husband of the "Lady of the Lake."

3. On the 31st of August, 1869, J. D. sold to the defendant, for the sum of £400, and by bill of sale duly executed, transferred to him his 32-64th shares, and the bill of sale was duly registered on the 14th of September following.

**Appendix C,
No. 21.**

4. After the "Lady of the Lake" had arrived at Sunderland, and after the defendant had purchased from J. D. his 32-64th shares of the "Lady of the Lake," the defendant placed the vessel in the custody and possession of a shipkeeper. The plaintiff, however, unlawfully removed her from such possession, and thereupon the defendant had the vessel taken into the South Dock of the harbour at Sunderland, with orders that she should be kept there. What the defendant did, as in this article mentioned, he did with the consent and full approval of J. D.

5. At the time of the sale of the "Lady of the Lake" by J. D. to the defendant as afore-mentioned, there was and there still is due from the plaintiff, as part owner of the "Lady of the Lake," to J. D. as part owner and ship's husband, a sum of money exceeding £300 in respect of the vessel and her voyages over and above the amount of the unpaid acceptances.

6. Save as herein appears, the averments in the fourth paragraph of the claim contained are untrue, and if the charter party mentioned in that paragraph was obtained by the plaintiff as alleged, which the defendant does not admit, it was obtained by him without the authority, consent, or knowledge of J. D. or the defendant.

7. Before the defendant took possession of the vessel as aforementioned, the plaintiff ceased to be master of her, with the consent of J. D. or the defendant.

8. J. D. has instituted an action against the said vessel in
in order to have the accounts taken between him and the plaintiff, and to enforce payment of the money due from the plaintiff to him.

[Title.]

Reply.

1. The plaintiff says in reply to the first paragraph of the defence that the bills therein mentioned were dishonoured by the plaintiff because J. D. was indebted to the plaintiff in a large amount for his wages as master, and for his share of the earnings of the "Lady of the Lake," and refused payment thereof.

2. J. D. did not place the vessel in the exclusive custody or possession of a shipkeeper as in the fifth paragraph of the defence stated or implied. On the contrary, the vessel continued in the custody and possession of the plaintiff, who still holds her register. A man was sent on board the vessel by J. D. to look after J. D.'s share in the said vessel while she was in dock, but he did not dispossess the said plaintiff or take exclusive possession of the vessel, and the plaintiff was not dispossessed of the vessel until on or about the 17th of September last.

3. Except as hereinbefore appears the plaintiff joins issue upon the defendant's statement of defence.* Appendix C,
No. 21.

[Title.]

Rejoinder.

The defendant joins issue upon the first and second paragraphs of the Reply.

No. 22.

PROMISSORY NOTE.

187 . B. No.

In the High Court of Justice,

† Division.

Writ issued 3rd August, 1876.

| | | | | | |
|---------------------|---|---|---|---|------------|
| Between <i>A.B.</i> | - | - | - | - | plaintiff, |
| | | | | | and |
| <i>E.F.</i> | - | - | - | - | defendant. |

Statement of Claim.

1. The defendant on the _____ day of _____ made his promissory note, whereby he promised to pay to the plaintiff or his order £ _____ three months after date.

2. The note became due on the _____ day of _____ 1874, and the defendant has not paid it.

The plaintiff claims

The amount of the note and interest thereon to judgment.

The plaintiff proposes that this action should be tried in the county of _____

[Title.]

Statement of Defence.

1. The defendant made the note sued upon under the following circumstances:—The plaintiff and defendant had for some years been in partnership as coal merchants, and it had been agreed between them that they should dissolve partnership, that the plaintiff should retire from the business, that the defendant should take over the whole of the partnership assets and liabilities, and should pay the plaintiff the value of his share in the assets after deducting the liabilities.

2. The plaintiff thereupon undertook to examine the partnership books, and inquire into the state of the partnership assets and liabilities; and he

* In *Hall v. Eve*, 4 Ch., D. 341; 46 L. J., (Ch), 145; 25 W. R., 177, the plaintiff replied specially to part of the statement of defence, and then joined issue generally on the statement of defence, "except as hereinbefore appears," following this precedent. Bacon, V.C., although his attention was called to this precedent, held that this mode of pleading was bad. His decision was overruled, however, by the Court of Appeal.

† Queen's Bench, Common Pleas, or Exchequer.

**Appendix C,
No. 22.**

did accordingly examine the books, and make the said inquiries, and he thereupon represented to the defendant that the assets of the firm exceeded £10,000, and that the liabilities of the firm were under £3,000, whereas the fact was that the assets of the firm were less than £5,000, and the liabilities of the firm largely exceeded the assets.

3. The misrepresentations mentioned in the last paragraph induced the defendant to make the note now sued on, and there never was any other consideration for the making of the note.

[*Title.*]

Reply.

The plaintiff joins issue on the defence.

No. 23.

PROBATE OF WILL IN SOLEMN FORM.

187 . B. No.

In the High Court of Justice,
Probate Division.

Writ issued []

Between *A.B.* - - - - plaintiff,
and
E.F. - - - - defendant.

Statement of Claim.

1. C. T., late of Bicester, in the county of Oxford, gentleman, deceased, who died on the 20th of January, 1875, at Bicester, being of the age of 21 years, made his last will, with one codicil thereto, the said will bearing date the first day of October, 1874, and the said codicil the first of January, 1875, and in the said will appointed the plaintiff sole executor thereof.

2. The said will and codicil were signed by the deceased [*or, by X.Y. in the presence and by the directions of the deceased, or signed by the deceased, who acknowledged his signature, or as the case may be*] in the presence of two witnesses present at the same time, the said will in the presence of H. P. and J. R., and the said codicil in the presence of J. D. and G. E., and who subscribed the same in the presence of the said deceased.

3. The deceased was at the time of the execution of the said will and codicil respectively of sound mind, memory, and understanding.

The plaintiff claims:—

That the Court shall decree probate of the said will and codicil in solemn form of law.

[*Title.*]

Statement of Defence.

The defendant says as follows:—

1. The said will and codicil of the said deceased were not duly executed according to the provisions of the statute 1 Vict. c. 26. Appendix C,
No. 23.

2. The deceased at the time the said will and codicil respectively purport to have been executed was not of sound mind, memory, and understanding.

3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him, whose names are at present unknown to the defendant].

4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud, so far as is within the defendant's present knowledge being [*state the nature of the fraud*].

5. The said deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof, or of the contents of the residuary clause in the said will [*as the case may be*].

6. The deceased made his true last will, dated the 1st day of January, 1873, and in the said will appointed the defendant sole executor thereof. [*Propound this will as in paragraphs 2 and 3 of claim.*]

The defendant claims:—

1. That the Court will pronounce against the said will and codicil propounded by the plaintiff:

2. That the Court will decree probate of the said will of the said deceased, dated the 1st of January, 1873, in solemn form of law.

[*Title.*]

Reply.

1. The plaintiff joins issue upon the statement of defence of the defendant, as contained in the first, second, third, fourth, and fifth paragraphs thereof.

2. The plaintiff says that the said will of the said deceased, dated the 1st of January, 1873, was duly revoked by the will of the said 1st of October, 1873, propounded by the plaintiff in his statement of claim.

A.D. 1876.

No. 24.

RECOVERY OF LAND.—LANDLORD AND TENANT.

187 . B. No.

In the High Court of Justice,

Common Pleas Division.*

Writ issued 3rd August, 1876.

Between A.B. - - - - - plaintiff,

and

C.D. - - - - - defendant.

Statement of Claim.

1. On the day of the plaintiff let to

* Or Queen's Bench or Exchequer.

**Appendix C,
No. 24.**

the defendant a house, No. 52, street, in the city of London,
as tenant from year to year, at the yearly rent of £120, payable quarterly
the tenancy to commence on the day of .

2. The defendant took possession of the house and continued tenant thereof until the day of last, when the tenancy determined by a notice duly given.

3. The defendant has disregarded the notice and still retains possession of the house.

The plaintiff claims :—

1. Possession of the house.

2. £ for mesne profits from the day of

The plaintiff proposes that this action should be tried in London.

In the High Court of Justice,
Common Pleas Division.

187 . No.

| | | | | | | |
|-------------------------|---|---|---|---|---|-----------------------|
| Between <i>A.B.</i> | - | - | - | - | - | plaintiff, |
| | | | | | | and |
| <i>C.D.</i> | - | - | - | - | - | defendant, |
| | | | | | | (by original action,) |
| And between <i>C.D.</i> | - | - | - | - | - | plaintiff, |
| | | | | | | and |
| <i>A.B.</i> | - | - | - | - | - | defendant, |
| | | | | | | (by counter-claim) |

The defence and counter claim of the above-named *C.D.*.*

1. Before the determination of the tenancy mentioned in the statement of claim, the plaintiff *A.B.*, by writing, dated the day , and signed by him, agreed to grant to the defendant *C.D.* a lease of the house mentioned in the statement of claim, at the yearly rent of £150, for the term of 21 years, commencing from the day of , when the defendant *C.D.*'s tenancy from year to year determined, and the defendant has since that date been and still is in possession of the house under the said agreement.

2 By way of counter-claim the defendant claims to have the agreement specifically performed and to have a lease granted to him accordingly, and for the purpose aforesaid, to have this action transferred to the Chancery division.

* See Order XIX., Rule 10.

COURT OF JUDICATURE ACTS, 1873 AND 1875. 859

In the High Court of Justice,
Chancery Division.

187 . No.

Appendix G,
No. 24.

(Transferred* by order dated day of .)

Between *A.B.* - - - - - plaintiff,

and

C.D. - - - - - defendant,

(by original action,)

And between *C.D.* - - - - - plaintiff,

and

A.B. - - - - - defendant.

(by counter-claim.)

The reply of the plaintiff *A.B.*

The plaintiff *A.B.* admits the agreement stated in the defendant *C.D.*'s statement of defence, but he refuses to grant to the defendant a lease, saying that such agreement provided that the lease should contain a covenant by the defendant to keep the house in good repair and a power of re-entry by the plaintiff upon breach of such covenant, and the plaintiff says that the defendant has not kept the house in good repair, and the same is now in a dilapidated condition.

[*Title.*]

Joinder of Issue.

The defendant *C.D.* joins issue upon the plaintiff *A.B.*'s statement in reply.

No. 25.

RECOVERY OF LAND.

187 . B. No.

In the High Court of Justice,
Common Pleas† Division.

Writ issued 3rd August, 1876.

Between *A.B.* and *C.D.* - - - - plaintiffs,

and

E.F. - - - - - defendant.

Statement of Claim.

1. *K. L.*, late of Sevenoaks, in the county of Kent, duly executed his last will, dated the 4th day of April, 1870, and thereby devised his lands at or near Sevenoaks, and all other his lands in the county of Kent, unto and to the use of the plaintiffs and their heirs, upon the trusts therein mentioned for the benefit of his daughters Margaret and Martha, and appointed the plaintiffs executors thereof.

* The reason of the transfer is, that the defendant, in his counterclaim, claims specific performance of the agreement for a lease, which, by s. 34 of the Principal Act, *supra*, is assigned to the Chancery Division. See also s. 36 of that Act, and Order II., *supra*.

† Or Queen's Bench or Exchequer.

**Appendix C,
No. 25.**

2. *K. L.* died on the 3rd day of January, 1875, and his said will was proved by the plaintiffs in the Court of Probate on or about the 4th day of February, 1875.

3. *K. L.* was at the time of his death seised in fee of a house at Seven-oaks, and two farms near there called respectively the Home farm containing 276 acres, and the Longton farm containing 700 acres both in the county of Kent.

4. The defendant, soon after the death of *K. L.*, entered into possession of the house and two farms, and has refused to give them up to the plaintiff.

The plaintiffs claim:—

1. Possession of the house and two farms:

2. £ for mesne profits of the premises from the death of *K. L.* till such possession shall be given.

The plaintiffs propose that this action should be tried in the county of Kent.

[*Title.*]

Statement of Defence.

1. The defendant is the eldest son of *I. L.*, deceased, who was the eldest son of *K. L.*, in the statement of claim named.

2. By articles bearing date the 31st day of May, 1827, and made previous to the marriage of *K. L.* with Martha his intended wife, *K. L.*, in consideration of such intended marriage, agreed to settle the house and two farms in the statement of claim mentioned (and of which he was then seised in fee) to the use of himself for his life, with remainder to the use of his intended wife for her life, and after the survivor's decease, to the use of the heirs of the body of the said *K. L.* on his wife begotten, with other remainders over.

3. The marriage soon after took effect; *K. L.*, by deeds of lease and release, bearing date respectively the 4th and 5th of April, 1828, after reciting the articles in alleged performance of them, conveyed the house and two farms to the use of himself for his life, with remainder to the use of his wife for her life, and after the decease of the survivor of them to the use of the heirs body (*sic*) of *K. L.* on the said Martha to be begotten with other remainders over.

4. There was issue of the marriage an only son Thomas L and two daughters. After the death of Thomas L , which took place in February, 1864, *K. L.*, on the 3rd May, 1864, executed a disentailing assurance, which was duly enrolled and thereby conveyed the house and two farms to the use of himself in fee.

[*Title.*]

Reply.

The plaintiffs join issue upon the defendant's statement of defence.

**Appendix C,
No. 28.**

Writ issued [].

Between A.B. and C.D. - - - - plaintiffs,
 and
E.F. and G.H. - - - - defendants.

1. The "Brazilian" is a screw steamer belonging to the port of Newcastle, of the burthen of 1,359 tons gross registered tonnage, and propelled by engines of 130 horse-power, and at the time of the rendering of the salvage services hereinafter mentioned she was navigated by her master and a crew of twenty-four hands. She left the port of Newcastle on the 27th of November, 1873, on a voyage to Genoa, and thence by way of Palmaras and Aguilas to the Tyne, and about 10 a.m. on the 26th of December, 1873, in the course of her homeward voyage, with a cargo of merchandise, she was off the coast of Portugal, the Island of Ons bearing about S.E. by E., when those on board her sighted a disabled steamer about four points on their starboard bow, inshore, flying signals of distress. A strong gale was blowing at the time, and there was a very heavy sea running.

2. The "Brazilian" at once made towards the disabled steamer, which proved to be the "Campanil," the vessel proceeded against in this action. She was heavily laden with a cargo of iron ore. The "Brazilian" as she approached the "Campanil" signalled to her, and the "Campanil" answered by signal that her engines had broken down. By this time the "Campanil" was heading in shore, rolling heavily, and shipping a large quantity of water. The "Brazilian" came under the lee of the "Campanil" and asked if she wanted assistance. Her master replied that he wanted to be towed to Vigo as his vessel had lost her screw. The master of the "Brazilian" then asked those on board the "Campanil" to send him a hawser, and for a long time those on board the "Brazilian" made attempts to get a hawser from the "Campanil," and exposed themselves and their vessel to great danger in doing so. The wind and sea rendering it impossible to get the hawser whilst the "Brazilian" was

† Jessel, M.R., transferred to the Admiralty Division an action for salvage commenced in the Chancery Division; *Humphreys v. Edwards*, 45 L.J. (Ch.), 112; W. N., 1875, p. 208; 1 Charley's Cases (Court), *supra*.

**Appendix C,
No. 28.**

to leeward of the "Campanil," the "Brazilian" went to windward and attempted to float lines by means of life buoys to the "Campanil." During all this time the "Campanil" was quite unmanageable, and yawed about, and there was very great difficulty in manœuvring the "Brazilian" so as to retain command over her and keep her near the "Campanil." It was necessary to keep constantly altering the engines of the "Brazilian," setting them on ahead and reversing them quickly, and in consequence the engines laboured heavily and were exposed to great danger of being strained.

3. Whilst the "Brazilian" was endeavouring to float lines to the "Campanil," the "Campanil" made a sudden lurch and struck the "Brazilian" on her port quarter, knocking in her port bulwark and rail, and causing other damage to the vessel. After many unsuccessful efforts by those on board the "Brazilian," and after they had lost two life buoys and a quantity of rope, a hawser from the "Campanil" was at length made fast on board the "Brazilian," and the "Brazilian" with the "Campanil" in tow steamed easy ahead. A second hawser was then got out and made fast with coir springs, and the "Brazilian" then commenced to tow full speed ahead, each hawser having a full scope of 90 fathoms.

4. The "Brazilian" made towards Vigo, which was about 35 miles distant, the vessels made about two knots an hour, the "Brazilian" keeping her engines going at full speed. The "Brazilian" laboured very heavily, and both vessels shipped large quantities of water.

5. About noon one of the tow ropes broke, and both vessels were in danger of being driven ashore, broken water and rocks appearing to leeward, distant about two miles. After great difficulty the broken hawser was made fast again with a heavy spring of a number of parts of rope, and the "Brazilian" towed ahead under the lee of Ons Island.

6. Shortly afterwards the weather moderated and the sea went down a little, and the "Brazilian" was able to make more way, and about 7 p.m. the same day she towed the "Campanil" into Vigo harbour in safety.

7. The "Brazilian" was compelled to remain in harbour the next day to pay port charges and clear at the Custom House.

8. The coast off which the aforesaid services were rendered is rocky and exceedingly dangerous, and strong currents set along it, and but for the services rendered by the "Brazilian" the "Campanil" must have gone ashore and been wholly lost, together with her cargo, and in all probability her master and crew would have been drowned. No other steamer was in sight, and there was not any prospect of any other efficient assistance.

9. In rendering the said services the "Brazilian" and those on board

were exposed to great danger. Owing to the heavy sea, and the necessity of towing with a long scope of hawser, there was great danger of fouling the screw of the "Brazilian," and it required constant vigilance on the part of the master and crew to prevent serious accident. The master and crew of the "Brazilian" underwent much extra fatigue and exertion.

The damage sustained by the "Brazilian" in rendering the said services amounts to the sum of £150, and the value of the extra quantity of coal consumed in consequence of the said services is estimated at £16, and £4 1s. 6d. was paid by the owners of the "Brazilian" for harbour dues and other charges at Vigo.

11. The value of the "Campanil," her cargo and freight, at the time the salvage services were as follows, that is to say: The "Campanil" of the value of £13,000, her cargo was of the value of £300, and the amount of freight payable upon delivery of the cargo laden on board her at Barrow-in-Furness was £675.

12. The value of the "Brazilian," her freight and cargo was about £5,050.

The plaintiffs claim:—

1. Such an amount of salvage as to the Court may seem just:
2. That the defendants and their bail be condemned in costs:
3. Such further or other relief as the nature of the case may require.

[Title.]

Statement of Defence.

1. The defendants say that upon the 22nd of December, 1873, the iron screw steamship "Campanil," of the burden of 660 tons register gross, propelled by engines of 70 horse-power, navigated by David Boughton, her master, and a crew of 16 hands, left Porman, bound to Barrow-in-Furness, laden with a cargo of iron ore.

2. At about 8 a.m. of the 26th of December, whilst the "Campanil" was prosecuting her voyage, the shaft of her propeller broke outside the stern tube, and she lost her propeller. The "Campanil" was then brought to the wind, which was south by east, blowing fresh, and she proceeded under sail for Vigo, and continued to do so until about 9.30 a.m., when two steamships which had been for some time in sight, and coming to the northward, approached the "Campanil." The ensign of the "Campanil" was hoisted, union up, as a signal to one of such steamships, which afterwards came to the "Campanil," and proved to be the "Brazilian," whose owners, master, and crew are the plaintiffs.

3. The "Brazilian" then signalled the "Campanil" and inquired what was the matter, and was signalled in reply that the "Campanil" had lost her propeller, and required to be towed to Vigo, upon which the "Brazilian" signalled for the rope of the "Campanil," in order to take

**Appendix C,
No. 26.**

her in tow. After this the "Brazilian" steamed round the "Campanil" and up on to her starboard bow, and in so doing the "Brazilian" came with her port quarter into the starboard bow of the "Campanil" and did her considerable damage.

4. The "Brazilian" then threw a heaving line on board the "Campanil," and one of the "Campanil's" hawsers was attached to the line and hauled on board the "Brazilian," which passed one of her hawsers to the "Campanil" by means of life buoys, and when such hawsers had been secured between the two vessels the "Brazilian" commenced to tow the "Campanil" for Vigo, it being at this time about 10.30 a.m., and Ons Island then bearing about south-east by south, and distant about fifteen miles.

5. The "Brazilian" proceeded with the "Campanil" in tow, but owing to the two vessels being laden, and to the small power of the "Brazilian," she was only able to make very slow progress with the "Campanil," and it was not until 6.30 p.m. of the said day that the "Brazilian" arrived at Vigo with the "Campanil," which then came to anchor off the town there.

6. The defendants on the day of tendered to the plaintiffs and have paid into court the sum of £350 for the services so as aforesaid rendered to the "Campanil" and her said cargo and freight, and offered to pay the costs, and submit that the same is ample and sufficient.

[Title.]

Reply.

1. The plaintiffs admit the first and second articles of the Answer, and they admit that the "Brazilian" came into collision with the "Campanil," and caused slight damage to the "Campanil," but save as aforesaid they join issue upon the statement of defence.

No. 27.

TRESPASS TO LAND.

187 . No.

In the High Court of Justice,

* Division.

Writ issued 3rd August, 1876.

Between *A.B.* - - - - - plaintiff,

and

E.F. - - - - - defendant.

Statement of Claim.

1. The plaintiff was, on the 5th March, 1876, and still is, the owner

* Queen's Bench, Common Pleas, or Exchequer.

and occupier of a farm called Highfield Farm, in the parish of
and county of

Appendix C,
No. 27.

2. A private road, known as Highfield Lane, runs through a portion of the plaintiff's farm. It is bounded upon both sides by fields of the plaintiff's, and is separated therefrom by a hedge and ditch.

3. For a long time prior to the 5th March, 1876, the defendant had wrongfully claimed to use the said road for his horses and carriages on the alleged ground that the same was a public highway, and the plaintiff had frequently warned him that the same was not a public highway, but the plaintiff's private road, and that the defendant must not so use it.

4. On the 5th March, 1876, the defendant came with a cart and horse, and a large number of servants and workmen, and forcibly used the road, and broke down and removed a gate which the plaintiff had caused to be placed across the same.

5. The defendant and his servants and workmen on the same occasion pulled down and damaged the plaintiff's hedge and ditch upon each side of the road, and went upon the plaintiff's field beyond the hedge and ditch, and injured the crops there growing, and dug up and injured the soil of the road; and in any case the acts mentioned in this paragraph were wholly unnecessary for the assertion of the defendant's alleged right to use, or the user of the said road as a highway.

The plaintiff claims:—

1. Damages for the wrongs complained of.
2. An injunction restraining the defendant from any repetition of any of the acts complained of.
3. Such further relief as the nature of the case may require.

[Title.]

Statement of Defence.

1. The defendant says that the road was and is a public highway for horses and carriages; and a few days before the 5th March, 1876, the plaintiff wrongfully erected the gate across the road for the purpose of obstructing and preventing, and it did obstruct and prevent the use of the road as a highway. And the defendant, on the said 5th March, 1876, caused the said gate to be removed, in order to enable him lawfully to use the road by his horses and carriages as a highway.

2. The defendant denies the allegations of the fifth paragraph of the statement of claim, and says that neither he nor any of his workmen or servants did any act, or used any violence other than was necessary to enable the plaintiff lawfully to use the highway.

[Title.]

Reply.

The plaintiff joins issue upon the defendant's statement of defence.

Appendix C,
No. 28.

No. 28.

*Form of Demurrer.**

In the High Court of Justice,
Division.

A. B. v. C. D.

The defendant [plaintiff] demurs to the [plaintiff's statement of complaint or defendant's statement of defence or of set-off, or of counter-claim], [or to so much of the plaintiff's statement of complaint as claims . . . or as alleges as a breach of contract the matters mentioned in paragraph 17, or as the case may be], and says that the same is bad in law on the ground that [here state a ground of demurrer] and on other grounds, sufficient in law to sustain this demurrer.

No. 29.

Memorandum of Entry of Demurrer for Argument.†

In the High Court of Justice,
Division.

1874. B. No.

A. B. v. C. D.

Enter for the argument the demurrer of
to

X. Y.,

Solicitor for the plaintiff [or, &c.]

APPENDIX (D.)‡

FORMS OF JUDGMENT.

1. *Default of Appearance§ and|| Defence¶ in case of Liquidated Demand.*

In the High Court of Justice,
Division.

1876. B. No.

Between *A.B.* - - - - - Plaintiff,
and

C.D. and E.F. - - - - - Defendants.

30th November, 1876.

The defendants [or the defendant *C.D.*] not having appeared to the

* This form is intended to illustrate Order XXVII., Rule 2, *supra*. See the note to that Rule. It is necessary to add to this form—"Demurrer delivered the day of , 187 ." A demurrer must be delivered within eight days, if it is a demurrer to the statement of claim—within three weeks, if it is a demurrer to the statement of defence. Order XXVIII., Rule 8.

† This form is intended to illustrate Order XXVIII., Rule 13, *supra*. Before the signature of the solicitor, the date of the memorandum should be inserted, thus—"Dated the day of , 187 ."

‡ This Appendix illustrates Order XLI., Rule 1, *supra*.

The number of forms given in this Appendix is very scanty. It has been found necessary in the Offices of the Supreme Court largely to supplement them.

§ See Order XIII., Rules 3, 4, and 5, *supra*.

|| This should be "or." ¶ See Order XXIX., Rules 2 and 3, *supra*.

Writ of summons herein [or not having delivered any statement of defence],
 It is this day adjudged that the plaintiff recover against the said de-
 fendant £ , and costs, to be taxed.*

Appendix D,
 Form 1.

2. Judgment in default of appearance in Action for Recovery of Land.†
 [Title, &c.]

20th November, 1876.

No appearance having been entered to the writ of summons herein,
 It is this day adjudged that the plaintiff recover possession of the land
 the said writ mentioned.‡

**3. Judgment in default of Appearance § and ¶ Defence ¶ after Assessment
 of Damages.**

1876. B. No.

In the High Court of Justice,
 Division.

Between A.B. and C.D. - - - - - Plaintiffs,
 and
 E.F. and G.H. - - - - - Defendants.

20th November, 1876.

The defendants not having appeared to the writ of summons here-
 in [or not having delivered a statement of defence] and a writ of inquiry
 dated 1876, having been issued directed to the sheriff of
 to assess the damages which the plaintiff was entitled to recover,
 and the said sheriff having by his return dated the 1876, re-
 turned that the said damages have been assessed at £ , it is
 adjudged that the plaintiff recover £ , and costs to be taxed.**

* In the Queen's Bench Division the following additional information
 is appended here:—"Which costs were, by a Master's Certificate, dated
 the day of , 187 , allowed at £ ."

The writer is indebted to Mr. Aldridge, of the Judgment Office of the
 Queen's Bench, for access to a number of the new Queen's Bench Forms
 of Judgment.

† See Order XIII., Rule 7, and Order XXIX., Rule 7, *supra*.

‡ In the Queen's Bench Division it is usual, at the end of the Form,
 to shew what is recovered by the judgment, as thus:—"And described as,
 All that messuage and premises called No. 4, Carter Street, Fulham
 Fields, in the County of Middlesex, with the appurtenances thereto
 belonging." The addition makes the judgment perfect in itself, and the
 profession generally gladly adopt it, when suggested. It is not, of
 course, insisted upon, if objected to.

§ See Order XIII., Rule 6, *supra*.

¶ It should be "or."

¶ See Order XXIX., Rule 4, *supra*.

** In the Queen's Bench Division the form is completed by the in-
 sertion of the amount of the costs (instead of, "And costs to be taxed").
 Thus, "And £ for costs. Certificate for costs, dated the day of
 , 187 ."

Appendix D,
Form 4.

4. Judgment at Trial by Judge without a Jury.*

[Year, letter, and number.]

Division.

day of 18

[If in Chancery Division, name of Judge.]

Between A.B. - - - Plaintiff,
and
C.D., E.F., and G.H. - Defendants.

This action coming on for trial [the day of and] this day, before in the presence of Counsel for the plaintiff and the defendants [or, if some of the defendants do not appear, for the plaintiff and the defendant C.D., no one appearing for the defendants E.F. and G.H., although they were duly served with notice of trial as by the affidavit of filed the day of appears,] upon hearing the probate of the will of , the answers of the defendants C.D., E.F., and G.H.; to interrogatories, the admission in writing, dated and signed by [Mr. the solicitor for] the plaintiff A.B. and by [Mr. the solicitor for] the defendant C.D., the affidavit of filed the day of , the affidavit of filed the day of , the evidence of taken on their oral examination at the trial, and an exhibit marked X., being an indenture dated, &c., and made between [parties], and what was alleged by Counsel on both sides: This Court doth declare, &c.

And this Court doth order and adjudge, &c.

5. Judgment after Trial by a Jury.†

[Title, &c.]

15th November, 1876.

The action having on the [12th and 13th November, 1876,] been tried before the Honourable Mr. Justice and a [special] jury of the county of , and the jury having found [state findings as in officer's certificate],‡ and the said Mr. Justice having ordered

* See Order XXXVI., Rule 26, *supra*, and s. 1 of the Common Law Procedure Act, 1854. As the certificate of the Associate (Order XXXVI., Rules 23, 24, and 25) only shews the result of the trial, Form No. 5 is adapted by the Queen's Bench Division to judgments where the action has been tried *without* a jury.

† See Order XXXVI., Rules 22, 22a., 23, 24, and 25. This form may be adapted to the entry of judgment either for the plaintiff or for the defendant.

‡ See, as to this certificate, Order XXXVI., Rules 23, 24, and 25, and Appendix (B), Form No. 15, *supra*.

COURT OF JUDICATURE ACTS, 1873 AND 1875. 869

that judgment be entered for the plaintiff for £ and costs of suit [or *as the case may be*]. Therefore it is adjudged that the plaintiff recover against the defendant £ and £ for his costs of suit [or that the plaintiff recover nothing* against the defendant, and that the defendant recover against the plaintiff £ for his costs† of defence, or *as the case may be*].‡

Appendix D,
Form 5.

6. *Judgment after Trial before Referee.*§
[Title, &c.]

30th November, 1876.

The action having on the 27th November, 1876, been tried before X.Y., Esq., an Official [or Special] Referee; and the said X.Y. having found [state substance of Referee's certificate], it is this day adjudged that

7. *Judgment upon Motion for Judgment.*||
[Title, &c.]

30th November, 1876.

This day before Mr. X. of Counsel for the plaintiff [or as the case may be], moved on behalf of the said [state judgment moved for], and the said Mr. X. having been heard of Counsel for and Mr. Y. of Counsel for the Court adjudged

* "Recover nothing." This is the form, as old as the Year Books, of "*nil capiat per breve*."

† A defendant, on his counterclaim, may now recover a substantial sum besides his costs.

‡ In the Queen's Bench Division the following addition is made here: "Judgment entered the day of , 187 . Certificate for costs dated the day of , 187 ."

§ See ss. 56 to 59 of the Principal Act, and Order XXXVI., Rules 29b to 34, *supra*.

The following variation of the form is used in the Queen's Bench Division, where appropriate:—"This action having by an order of the Honble. Mr. Justice , dated the day of , 187 , been referred for trial to Esq., with all the powers, &c. (as in the order of Reference), and the said Referee having by his Report herein, dated the day of 187 , reported and directed as follows (set out substance of Report), it is this day adjudged, &c. Certificate for costs dated the day of 187 ."

|| See Order XL., *supra*.

In the Queen's Bench Division this Form is varied as follows:—"The day of 187 . [date of order of Court.] This action having come on before the Court on [plaintiff's] notice of motion, the Court, on the day of , 187 , upon reading the affidavit of and the notice of

APPENDIX (E).*

FORMS OF PRÆCIPE.

1. *Fieri facias*.

1876. B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiff,
and
C.D. and others - - - - - Defendants.

Seal a writ of *fieri facias* directed to the sheriff of to
levy against *C.D.* the sum of £ and interest
thereon at the rate of £ per centum per annum from the
day of [and £ costs] to
Judgment [or order] dated day of
[Taxing master's certificate, dated day of
X.Y., Solicitor for [party on whose
behalf writ is to issue.]

2. *Elegit*.

187 . B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiff,
and
C.D. and others - - - - - Defendants.

Seal a writ of *elegit* directed to the sheriff of
against of in the county of

motion thereto annexed, and upon hearing Mr. , Counsel for
the [plaintiff, and no one appearing on behalf of the defendant, or as the
case may be] ordered that the [plaintiff] be at liberty to enter up judgment
against the [defendant] for the sum of £ , and [as in the order of Court].
Therefore it is adjudged that the [plaintiff] recover against the [defendant]
£ , and £ for costs. Judgment entered the day of
187 . Certificate for costs dated the day of 187 ."

* This Appendix illustrates Order XLII., Rule 10, *supra*. No writ of
execution is to issue without a *præcipe*. The *præcipe* must contain, *inter*
alia, (1) the title of the action; (2) the reference to the record; (3) the
date of the judgment [or order]; (4) the names of the execution-debtors;
(5) and the signature of the solicitor, or of some one on his behalf.
Ib., and Rule 10a.

The date of the *præcipe* should in each of these forms be inserted
before the name of the solicitor, thus:—"Dated the day of
187 ."

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not paying to *A. B.* the sum of £ , together with interest Appendix B,
 from the day of [and the sum of Form 2.
 for costs,] with interest thereon at the rate of £4 per centum
 annum.

Judgment [or order] dated - day of 18
 [Taxing master's certificate, dated day of 18 .]
 X.Y.,
 Solicitor for

3. *Venditioni Exponas.*

187 . B. No.

the High Court of Justice,
 Division.

Between *A. B.* - - - - - Plaintiff,
 and
C. D. and others - - - - - Defendants.

Seal a writ of *venditioni exponas* directed to the sheriff of
 all the goods and of *C. D.* taken under a writ of *feri*
 in this action tested day of
 X.Y.,
 Solicitor for

4. *Fieri Facias de Bonis Ecclesiasticis.*

the High Court of Justice, 187 . B. No.
 Division.

Between *A. B.* - - - - - Plaintiff,
 and
C. D. - - - - - Defendant.

Seal a writ of *feri facias de bonis ecclesiasticis* directed to the bishop
 archbishop as the case may be] of to levy against *C. D.*
 sum of £ .

Judgment [or order] dated day of
 [Taxing master's certificate, dated day of].
 X.Y.,
 Solicitor for

5. *Sequestrari Facias de Bonis Ecclesiasticis.*

187 . B. No.

the High Court of Justice,
 Division,

Between *A. B.* - - - - - Plaintiff,
 and
C. D. and others - - - - - Defendants

Seal a writ of *sequestrari facias* directed to the Lord Bishop of
 against *C. D.* for not paying to *A. B.* the sum of £

Appendix E,
Form 6.

6. *Writ of Sequestration.*

187 . B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiff,

and

C.D. and others - - - - - Defendants.

Seal a writ of sequestration against *C.D.* for not
the suit of *A.B.* directed to [names of Commissioners].

Order dated _____ day of _____

7. *Writ of Possession.*

187 . B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiff,

and

C.D. and others - - - - - Defendants.

Seal a writ of possession directed to the sheriff of _____ to
deliver possession to *A.B.* of _____

Judgment dated _____ day of _____

8. *Writ of Delivery.*

187 . B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiff,

and

C.D. and others - - - - - Defendants.

Seal a writ of delivery directed to the sheriff of _____ to make
delivery to *A.B.* of _____

9. *Writ of Attachment.*

187 . B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiff,

and

C.D. and others - - - - - Defendants.

Seal in pursuance of order dated _____ day of _____
an attachment directed to the sheriff of _____ against *C.D.* for not
delivering to *A.B.* _____

COURT OF JUDICATURE ACTS, 1873 AND 1875.

APPENDIX (F.)*

Appendix F.
Form 1

FORMS OF WRITS.

1. *Writ of Fieri Facias*.†

187 . B. N

In the High Court of Justice,

Division.

Between *A.B.* - - - - - Plaintiff,

and

C.D. and others - - - - - Defendants.

Victoria, by the grace of God of the United Kingdom of Great
Britain and Ireland Queen, Defender of the Faith.

To the sheriff of greeting :

We command you that of the goods and chattels of *C.D.* in your baili-
wick you cause to be made the sum of £ , and also
interest thereon at the rate of £ per centum per annum
from the day of ‡ which said

* This Appendix illustrates Order XLII., Rule 12, *supra*.

The following remarks of Lord Coleridge, C.J., as to the authority of these forms, and of the footnotes attached thereto by the Legislature, may here be appropriately cited:—"I find that s. 16 of the Supreme Court of Judicature Act, 1875, states that 'the Rules of Court in the First Schedule' to that Act, 'as to all matters to which they extend shall' thenceforth 'regulate the proceedings in the High Court of Justice.' Now, this is a proceeding in the High Court of Justice" (a motion to vary the order of a Master as to the date from which interest should run on costs,) "and the question is, if this form given in App. F., Form No. 1, is part of such Rules. Now, I find it enacted by Order II., Rule 2, that where any person departs from the forms of writs prescribed, he does so at the risk of incurring the penalty of costs. What forms? They are the forms thereafter prescribed by these Orders. There is evidently no distinction made in Order II., Rule 2, between following the form prescribed for a writ of summons, and the form prescribed for a writ of *fi. fa.* They are both forms hereinafter prescribed within the meaning of that Rule. Then I find in this form No. 1 in App. F., which is therefore a form prescribed by Act of Parliament, this direction to the sheriff—namely, to levy the amount of the costs allowed on the taxation, 'together with interest thereon at the rate of £4 per cent. per annum from the day of .'. Then there is a footnote appended thereto, which says, 'The date of the certificate of taxation.' This is the *prescribed* date given by the late Act of Parliament" (the Act of 1875), "and being the later one, it must prevail over the previous Act" (1 & 2 Vict. c. 110, s. 17). *Schröder v. Clough*, 46 L. J. (C. P.), 365; 35 L. T., 850.

† See Order XLII., Rules 1, 6, and 15, *supra*; Order XLIII., Rule 1. Form of Writs of *fi. fa.* will be found in the Schedule to Reg. Gen. Hil. T., 1853, Nos. 1 to 8.

‡ Day of the judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be. [Statutory note.]

**Appendix F,
Form 1.**

sum of money and interest were lately before us in our High Court of Justice in a certain action [*or certain actions, as the case may be*] wherein *A.B.* is plaintiff and *C.D.* and others are defendants [*or in a certain matter there depending intituled "In the matter of E.F." as the case may be*] by a judgment [*or order, as the case may be*] of our said Court, bearing date the day of adjudged * [*or ordered, as the case may be*] to be paid by the said *C.D.* to *A.B.*, together with certain costs in the said judgment, [*or order, as the case may be*] mentioned, and which costs have been taxed and allowed by one of the taxing masters of our said Court at the sum of £ as appears by the certificate of the said taxing master, dated the day of . And that of the goods and chattels of the said *C.D.* in your bailiwick you further cause to be made the said sum of £ [*costs*] together with interest thereon at the rate of £4 per centum per annum from the day of †, and that you have that money and

* In *Bolton v. Bolton*, 3 Ch. D., 276; 35 L. T., 358; 24 W. R., 663, the plaintiff having discontinued, but made default in paying the defendants' taxed costs, under Order XXIII., a difficulty arose in issuing a writ of *fi. fa.* for the recovery of the defendant's taxed costs, on account of the provision in Order XLII., Rule 9, that "no writ of execution shall be issued without the production to the officer of the judgment, or an office copy thereof." There was no "judgment," properly so called, in *Bolton v. Bolton*, and, therefore, a literal compliance with Order XLII., Rule 9, was impossible.

Hall, V.C., on an *ex parte* application on behalf of the defendant, consented to regard the words of Order XXIII., "thereupon the plaintiff shall pay the defendant's costs of the action," as equivalent to a judgment or order for their recovery; and, on the strength of the language of Order XLII., Rule 12, "the forms in Appendix F. may be used, with such variations as circumstances may require," gave leave to issue a writ of *fi. fa.*, with this variation in the body of the above statutory form:—"Which was lately," &c., "in a certain action," &c. "pursuant to Order XXIII. of the Rules of Court, 1875, upon a notice in writing, dated," &c., "whereby the said A. B. gave notice to the said C. D. of discontinuance of the said action, and upon the certificate of one of the taxing masters of our said Court, filed," &c., "adjudged to be paid for the costs of the said action by the said C. D., together with interest thereon from," &c. (the date of the taxing master's certificate).

The necessity for this "variation" in the future has been obviated by the new Rule 3 of Order XXIII. (Rules of the Supreme Court, June, 1876, Rule 9):—"A defendant may sign judgment for the costs of an action, if it is wholly discontinued."

† THE DATE OF THE CERTIFICATE OF TAXATION. The writ *must* be so moulded as to follow the substance of the judgment or order. [Statutory note.]

In *Schröder v. Clough*, 46 L. J. (C. P.), 365; 55 L. T., 850, judgment for the defendant was entered on the 10th of January, 1876, but there was a delay in the taxation of the defendant's costs, and the Master's *allocatur* for the amount of these costs was not given till the 29th of November, 1876. The Master, on the strength of the above statutory note, gave interest on

interest before us in our said Court immediately after the execution hereof to be paid to the said *A.B.* in pursuance of the said judgment [or order, *as the case may be.*] And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

Witness, &c.

Appendix F,
Form 1.

2. *Writ of Elegit.*

187 . B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiff,
and

C.D. and others - - - - - Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To the sheriff of , greeting.

Whereas lately in our High Court of Justice in a certain action [or certain actions, *as the case may be*] there depending, wherein *A.B.* is plaintiff and *C.D.* and others are defendants [or in a certain matter there depending, intituled "In the matter of *E.F.*," *as the case may be*] by a judgment [or order, *as the case may be*] of our said Court, made in the said action [or matter, *as the case may be*], and bearing date the day of , it was adjudged [or ordered, *as the case may be*] that *C.D.* should pay unto *A.B.* the sum of £ , together with interest thereon after the rate of £ per centum per annum from the day of , together also with certain costs as in the said judgment [or order, *as the case may be*] mentioned, and which costs

the costs from the latter date only, in accordance with the Equity practice; and the Common Pleas Division held that the Master's decision was right. In the opinion of Lord Coleridge, C.J., and Denman, J., the statutory note repeals 1 & 2 Vict. c. 110, s. 17, which enacts that a judgment debt shall carry interest from the date of entering judgment; but Grove, J., did not think it necessary to go so far, as the decision dealt only with the costs.

N.B. The following "direction to the sheriff" must be indorsed upon the writ, pursuant to Order XLII., Rule 14, *supra* :—"Levy £ and £ for costs of execution, &c., and also interest on £ at £4 per cent. per annum from the day of 187 , until payment, besides sheriff's poundage, officers' fees, and costs of levying all other legal expenses of the execution." (See Rule 13.) Under Order XLII., Rule 11, the following information must be indorsed on the writ :—"This writ was issued by , of , solicitor for the within-named . " "The defendant is a , and resides at in your bailiwick."

**Appendix F,
Form 3.**

have been taxed and allowed by one of the taxing masters
of our said Court, at the sum of £ , as appears by the certifi-
cate of the said taxing-master, dated the day of .
And afterwards the said *A.B.* came into our said Court, and according to
the statute in such case made and provided, chose to be delivered to him
all the goods and chattels of the said *C.D.* in your bailiwick, except his
oxen and beasts of the plough, and also all such lands, tenements, recto-
ries, tithes, rents, and hereditaments, including lands and hereditaments
of copyhold or customary tenure in your bailiwick as the said *C.D.*, or
any one in trust for him, was seised or possessed of on the day
of , in the year of our Lord * or at any time after-
wards, or over which the said *C.D.* on the said day of
or at any time afterwards had any disposing power which he might
without the assent of any other person exercise for his own benefit to
hold to him the said goods and chattels as his proper goods and chattels,
and to hold the said lands, tenements, rectories, tithes, rents, and here-
ditaments respectively, according to the nature and tenure thereof to him
and to his assigns, until the said two several sums of £ and
£ , together with interest upon the said sum of £ at the
rate of £ per centum per annum from the said day
of and on the said sum of £ (costs) at the rate of
£4 per centum per annum from the day of shall have
been levied. Therefore we command you that without delay you cause
to be delivered to the said *A.B.* by a reasonable price and extent all the
goods and chattels of the said *C.D.* in your bailiwick, except his oxen
and beasts of the plough, and also all such lands and tenements, rectories,
tithes, rents, and hereditaments, including lands and hereditaments of
copyhold or customary tenure, in your bailiwick as the said *C.D.*, or any
person or persons in trust for him was or were seised or possessed of on
the said day of † or at any time afterwards
or over which the said *C.D.* on the said day of †
or at any time afterwards had any disposing power which he might
without the assent of any other person, exercise for his own benefit, to
hold the said goods and chattels to the said *A.B.*, as his proper goods
and chattels, and also to hold the said lands, tenements, rectories, tithes,
rents, and hereditaments respectively, according to the nature and tenure
thereof to him and to his assigns until the said two several sums of
£ and £ together with interest as aforesaid, shall have
been levied. And in what manner you shall have executed this our writ
make appear to us in our Court aforesaid, immediately after the execution

* The day on which the judgment or order was made [Statutory note].

† The day on which the decree or order was made [Statutory note].

thereof, under your seals, and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ. Appendix F,
Form 2.

Witness Ourselves at Westminster, &c.*

3. *Writ of Venditioni Exponas.*†

187 . B. No.

In the High Court of Justice,
Division.

Between *A.B.* Plaintiff,
and

C.D. and others Defendants.

Victoria, by the grace of God of the United Kingdom of Great
Britain and Ireland Queen, Defender of the Faith.

To the Sheriff of greeting :

Whereas by our writ we lately commanded you that of the goods and
chattels of *C.D.* [*here recite the fieri facias to the end*]. And on the
day of you returned to us in the

Division of our High Court of Justice aforesaid, that by
virtue of the said writ to you directed you had taken goods and chattels
of the said *C.D.* to the value of the money and interest aforesaid, which
said goods and chattels remained in your hands unsold for want of
buyers. Therefore we being desirous that the said *A.B.* should be satis-
fied his money and interest aforesaid, command you that you expose to
sale and sell, or cause to be sold, the goods and chattels of the said *C.D.*,
by you in form aforesaid taken, and every part thereof, for the best price
that can be gotten for the same, and have the money arising from such
sale before us in our said Court of Justice immediately after the execu-
tion hereof, to be paid to the said *A.B.* And have there then this writ.

Witness Ourselves at Westminster, the day of.
in the year of our reign.‡

* The form of *teste* of this writ of execution must be the same as
that prescribed by authority for the *teste* of writs of summons:—
“Witness Hugh McCalmont, Baron Cairns, Lord High Chancellor of
Great Britain, at Westminster, the day of 187 .”
See Order II., Rule 8.

N.B. As this is a writ “for recovery of money,” it must be indorsed
with a “direction to the sheriff” in the same manner as a writ of *fi. fa.*
See Order XLII., Rule 14, *supra*.

The other indorsements must also be the same as on a writ of *fi. fa.*
See Order XLII., Rule 11, *supra*.

† See Order XLIII., Rule 2, *supra*.

‡ This form of *teste* is erroneous. See the notes to the writ of *elegit*,
No. 2, *supra*. N.B.—This writ should be indorsed in the same manner
as a writ of *fi. fa.*

Appendix F,
Form 4.4. *Writ of Fieri Facias de Bonis Ecclesiasticis.**

187 . B. No.

In the High Court of Justice,
Division.Between *A.B.* - - - - - Plaintiff,
and
C.D. and others - - - - - Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; To the Right Reverend Father in God [*John*] by divine permission Lord Bishop of greeting: We command you, that of the ecclesiastical goods of *C.D.*, clerk in your diocese, you cause to be made £ which lately before us in our High Court of Justice in a certain action [*or certain actions, as the case may be*] wherein *A.B.* is plaintiff and *C.D.* is defendant [*or in a certain matter there depending, intituled "In the matter of E.F.," as the case may be*], by a judgment [*or order, as the case may be*] of our said Court bearing date the day of was adjudged [*or ordered, as the case may be*] to be paid by the said *C.D.* to the said *A.B.*, together with interest on the said sum of at the rate of £ per centum per annum, from the day of and have that money, together with such interest as aforesaid before us in our said Court immediately after the execution hereof, to be rendered to the said *A.B.*, for that our sheriff of returned to us in our said Court on [*or "at a day now past"*] that the said *C.D.* had not any goods or chattels or any lay fee in his bailiwick whereof he could cause to be made the said £ and interest aforesaid or any part thereof, and that the said *C.D.* was a beneficed clerk (to wit) rector of the rectory [*or vicar of the vicarage*] and parish church of , in the said sheriff's county, and within your diocese [*as in the return*], and in what manner you shall have executed, this our writ make appear to us in our said Court immediately after the execution hereof, and have you there then this writ. Witness Ourselves at Westminster, the day of in the year of our Lord

5. *Writ of Fieri Facias to the Archbishop de bonis Ecclesiasticis during the vacancy of a Bishop's See.*†Victoria [*&c. as in the preceding form*]: To the Right Reverend Father in* See Order XLIII., Rule 2, of the present Act, *supra*, and Form 5, *infra*.† See Order XLIII., Rule 2, and Form No. 4, *supra*.

God [John] by Divine Providence Lord Archbishop of Canterbury, Primate of all England and Metropolitan, greeting: We command you, that of the ecclesiastical goods of C.D., clerk in the diocese of which is within the province of Canterbury, as Ordinary of that church, the episcopal see of now being vacant, you cause to be made [&c., conclude as in the preceding form].

Appendix F,
Form 5.

6. *Writ of Sequestrari Facias de bonis Ecclesiasticis.**

187 . B. No.

In the High Court of Justice,
Division.

Between A.B. - - - Plaintiff,

and

C.D. and others - - - Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; To the Right Reverend Father in God [John] by Divine permission Lord Bishop of greeting: Whereas we lately commanded our sheriff of that he should omit not by reason of any liberty of his county, but that he should enter the same, and cause [to be made, if after the return to a fieri facias, or delivered, if after the return to an elegit, &c., and in either case recite the former writ.] And whereupon our said sheriff of on [or "at a day past"] returned to us in the Division of our said Court of Justice, that the said C.D. was a beneficed clerk; that is to say rector of the rectory [or vicar of the vicarage] and parish church of in the county of , and within your diocese and that he had not any goods or chattels, or any lay fee in his bailiwick [here follow the words of the sheriff's return.] Therefore we command you that you enter into the said rectory [or vicarage] and parish church of , and take and sequester the same into your possession, and that you hold the same in your possession until you shall have levied the said £ and interest aforesaid, of the rents, tithes, rentcharges in lieu of tithes, oblations, obventions, fruits, issues, and profits thereof and other ecclesiastical goods in your diocese of and belonging to the said rectory [or vicarage] and parish church of and to the said C.D. as rector [or vicar] thereof to be rendered to the said A.B., and what you shall do therein make appear to us in our said Court immediately after the execution hereof, and have you there then this writ. Witness Ourselves at Westminster the day of in the year of our Lord .

* See Order XLIII., Rule 2, *supra*.

Appendix F,
Form 7.7. *Writ of Possession.**

187 . B. No.

In the High Court of Justice,
Division.Between *A.B.* - - - Plaintiffs,
and
C.D. and others - - - Defendants.

Victoria, to the sheriff of , greeting :

Whereas lately in our High Court of Justice, by a judgment of the
Division of the same Court [*A.B.* recovered] or [*E.F.* was
ordered to deliver to *A.B.*] possession of all that with
the appurtenances in your bailiwick: Therefore, we command you that
you omit not by reason of any liberty of your county, but that you enter
the same, and without delay you cause the said *A.B.* to have possession of
the said land and premises with the appurtenances. And in what manner
you have executed this our writ make appear to the Judges of the
Division of our High Court of Justice immediately
after the execution hereof, and have you there then this writ. Witness, &c.

8. *Writ of Delivery.†*

187 . B. No.

In the High Court of Justice,
Division.Between *A.B.* - - - Plaintiff,
and
C.D. and others - - - Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain
and Ireland Queen, Defender of the Faith; To the sheriff of greet-
ing: We command you, that without delay you cause the following
chattels, that is to say [*here enumerate the chattels recovered by the judg-
ment for the return of which execution has been ordered to issue*], to be re-
turned to *A.B.*, which the said *A.B.* lately in our recovered
against *C.D.* [or *C.D.* was ordered to deliver to the said *A.B.*] in an
action in the Division of our said Court.* And we further
command you, that, if the said chattels cannot be found in your bailiwick,
you distrain the said *C.D.* by all his lands and chattels in your baili-
wick, so that neither the said *C.D.*, nor any one for him do lay
hands on the same until the said *C.D.* render to the said *A.B.* the said
chattels; and in what manner you shall have executed this our writ make
appear to the Judges of the Division of our High Court of

* See Order XLII., Rule 3, and Order XLVIII., *supra*. See, also,
Order XL., Rule 11, as to indorsements.

† See Order XLII., Rule 4, and Order XLVIII., *supra*.

Justice, immediately after the execution hereof, and have you there then this writ. Witness, &c. Appendix F,
Form 8.

The like, but instead of a Distress until the Chattel is returned, commanding the Sheriff to levy on defendant's Goods the assessed value of it.

[Proceed as in the preceding form until the*, and then thus:] And we further command you, that if the said chattels cannot be found in your bailiwick, of the goods and chattels of the said C.D. in your bailiwick you cause to be made £ [the assessed value of the chattels], and in what manner you shall have executed this our writ make appear to the Judges of the Division of our High Court of Justice at Westminster, immediately after the execution hereof, and have you there then this writ. Witness, &c.*

9. Writ of Attachment.†

In the High Court of Justice, 187 . B. No.
Division.

Between A.B. : - - - Plaintiff,
and
C.D. and others - - - Defendants.

Victoria, &c.

To the sheriff of greeting:

We command you to attach C.D. so as to have him before us in the Division of our High Court of Justice wheresoever the said Court shall then be, there to answer to us, as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you. Witness, &c.‡

10. Writ of Sequestration.§

In the High Court of Justice, 187 . B. No.
Division.

Between A.B. - - - Plaintiff,
and
C.D. and others - - - Defendants.

Victoria, &c.

To [names of not less than four Commissioners] greeting:

Whereas lately in the Division of our High Court of

* These two forms are copied from the 34th and 35th forms in the Schedule to the Reg. Gen. Mich. Vac., 1854. See Order XLII., Rule 11, as to indorsements.

† See Order XLII., Rules 2, 4, 5 and 6, and Order XLIV., Rules 1 and 2, *supra*.

‡ See Order XLII., Rule 11, as to indorsements.

§ See Order XLII., Rules 2, 4 and 6, and Order XLVIII., *supra*.

**Appendix F,
Form 10.**

Justice in a certain action there depending, wherein *A.B.* is plaintiff and *C.D.* and others are defendants [*or*, in a certain matter then depending, intituled "In the matter of *E.F.*," *as the case may be*] by a judgment [*or order, as the case may be*] of our said Court made in the said action [*or matter*], and bearing date the day of 187 , it was ordered that the said *C.D.* should [pay into Court to the credit of the said action the sum of £ , *or as the case may be*]. Know ye, therefore, that we, in confidence of your prudence and fidelity, have given, and by these presents do give to you, or any three or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estates whatsoever of the said *C.D.*, and to collect, receive, and sequester into your hands not only all the rents and profits of his said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estates whatsoever, and therefore we command you, any three or two of you, that you do at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements, and real estates of the said *C.D.* and that you do collect, take, and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands until the said *C.D.* shall [pay into Court to the credit of the said action the sum of £ *or as the case may be*,] clear his contempt, and our said Court make other order to the contrary. Witness, &c.*

* See Order XL., Rule 11, as to indorsements.

SECOND SCHEDULE.***Repeal.**

| Session and Chapter. | Title. | Extent of Repeal. |
|------------------------|--|---|
| 6 Geo. IV. c. 84. | An Act to provide for the augmenting the salaries of the Master of the Rolls and the Vice-Chancellor of England, the Chief Baron of the Court of Exchequer, and the Puisne Judges and Barons of the Courts in Westminster Hall, and to enable His Majesty to grant an annuity to such Vice-Chancellor, and additional annuities to such Master of the Rolls, Chief Baron, and Puisne Judges and Barons on their resignation of their respective offices. | Section seven. |
| 32 & 33 Vict. c. 71 | The Bankruptcy Act, 1869 - | Section one hundred and sixteen from "provided that at any time," inclusive, to end of the section. |
| 32 & 33 Vict. c. 83 | The Bankruptcy Repeal and Insolvent Court Act, 1869. | Section nineteen from "provided that at any time," inclusive, to end of the section. |
| 36 & 37 Vict. c. 66 | Supreme Court of Judicature Act, 1873. | So much of sections three and sixteen as relates to the London Court of Bankruptcy, section six, section nine, section ten, so much of section thirteen as relates to Additional Judges of the Court of Appeal, section thirty-four from "all matters pending in the London Court of Bankruptcy" to "London Court of Bankruptcy," section thirty-five, section forty-eight, section fifty - three, section sixty - three, section sixty - eight, section sixty-nine, section seventy, section seventy-one, section seventy-two, section seventy - three, section seventy-four, and THE WHOLE OF THE SCHEDULE. |

* This is the Schedule referred to in section 33 of the present Act. A list is given in the note to that section, *supra*, of the other enactments repealed by this Act in addition to those mentioned in this Schedule.

RULES OF THE SUPREME COURT (COSTS).*

FIRST ORDER IN COUNCIL,†

OF 12TH AUGUST, 1875.

At the Court at Osborne House, Isle of Wight, the
12th day of August, 1875.

PRESENT,

The QUEEN'S Most Excellent Majesty in Council.

First Order in
Council,
Aug. '12, 1875.

WHEREAS by an Act passed in the present Session of Parliament intituled "An Act to amend and extend the Supreme Court of Judicature Act, 1873," it is enacted‡ that Her Majesty may, at any time after the passing and before the commencement of the said Act, by Order in Council, made upon the recommendation of the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer and the Lords Justices of Appeal in Chancery, or any five of them and the other Judges of the several Courts intended to be united and consolidated by the said Principal Act as amended by the said Act, or of a majority of such other Judges, make any further or Additional Rules of Court§ for carrying the said Principal Act and the said Act into effect, and in particular for all or any of the following matters, so far as

* By Rule 1 of the Rules of the Supreme Court, December, 1875, "The Additional Rules of Court made by Order in Council on the 12th day of August, 1875, may be cited as 'The Rules of the Supreme Court (Costs).'"

† From the "London Gazette" of 24th August, 1875.

‡ Section 17 of the Supreme Court of Judicature Act, 1875, is referred to.

§ The new body for making Rules of Court is defined by s. 17 of the Appellate Jurisdiction Act, 1876.

they are not provided for by the Rules in the first Schedule to the said Act; that is to say, (1) For regulating the sittings of the High Court of Justice and the Court of Appeal, and of any Divisional or other Courts thereof respectively, and of the Judges of the said High Court sitting in chambers; and (2) For regulating the pleadings, practice and procedure in the High Court of Justice and Court of Appeal; and (3) Generally for regulating any matters relating to the practice and procedure of the said Courts respectively or to the duties of the officers thereof or of the Supreme Court, or to the costs of proceedings therein :

First Order in
Council,
Aug. 12, 1875

Now, therefore, Her Majesty, in pursuance of the said Act and by and with the advice of Her Privy Council, and upon the recommendation of the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer and the Lords Justices of Appeal in Chancery and a majority of the other Judges of the several Courts intended to be united and consolidated by the said Principal Act as amended by the said Act, is pleased to make and issue the Additional Rules of Court following for the purposes aforesaid.

C. L. Peel.

ADDITIONAL RULES OF COURT UNDER THE SUPREME
COURT OF JUDICATURE ACT, 1875.

ORDER I.

Where any written deposition of a witness has been filed for use on a trial, such deposition shall be printed, unless otherwise ordered.

See the Order in Chancery of the 16th of May, 1862, Rule 4. As to "evidence generally," see Order XXXVII., *supra*.

"Has been filed." See Rule 4 of Order XXXVII., and *Bolton v. Bolton*,* cited under that Rule, *supra*.

"Shall be printed." See Order LVI., Rule 2, *supra*, and Order V. of these Rules, *infra*.

* 2 Ch. D., 217; 34 L. T., 123; 24 W. R., 426.

Order II,
Aug. 12, 1875.

ORDER II.

The Rules of Court as to printing depositions and affidavits to be used on a trial shall not apply to depositions and affidavits which have previously been used upon any proceeding without having been printed.

As to "printing depositions," see Order I. of these Rules, *supra*.

By Rule 6 of Order XXXVIII., "when the evidence in any action is, under" that "Order, taken by *affidavit*, such evidence shall be printed."

As to the practice in the Court of Appeal, see Order LVIII., Rule 11, *supra*.

ORDER III.

Other affidavits than those required to be printed by Order XXXVIII., Rule 6, in the Schedule to the Supreme Court of Judicature Act, 1875, may be printed if all the parties interested consent thereto, or the Court or Judge so order.

This was Order LVI., Rule 6, of the Schedule to the Supreme Court of Judicature Act, 1875, but it was struck out in Committee on the Bill in the House of Commons, and was inserted here instead.

"Those required to be printed." All evidence by affidavit in any action under Order XXXVIII. is "required to be printed."

ORDER IV.

The 3rd Rule of the Order XXXIV., in the First Schedule to the Supreme Court of Judicature Act, 1875, shall apply to a special case, pursuant to the Act of 13 and 14 Victoria, c. 35.

By Order XXXIV., Rule 3, *supra*, "every special case shall be printed by the plaintiff, and signed by the several parties and their solicitors, and shall be filed by the plaintiff. Printed copies for the use of the Judges shall be delivered by the plaintiff." See Reg. Gen. Hil. T., 1853, Rule 16.

The present Order "refers to printing special cases *in Equity*." The 13 & 14 Vict. c. 35, enabled parties interested in questions cognizable in the Court of Chancery to concur in stating a special case for the opinion of that Court.*

ORDER V.

Where, pursuant to Rules of Court, any pleading,

* Coe's Practice of the Judges' Chambers, 107.

special case, petition of right, deposition, or affidavit is TO BE PRINTED, and where any printed or other office copy thereof is to be taken, the following regulations shall be observed:—

Order V,
Aug. 12, 1875.

“Any pleading.” Every pleading containing more than ten folios of seventy-two words each, and not being a petition or summons, must be printed, under Order XIX., Rules 5 and 5a, *supra*.

“Special case.” See Order IV. of these Rules, *supra*. Every special case must be printed by the plaintiff, under Order XXXIV., Rule 3.

“Petition of right.” As to petitions of right, see the 23 and 24 Vict. c. 34 (1860). A printed copy of the petition of right must be filed, under the Chancery Order of February 1st, 1862.

“Deposition.” See Order I. of these Rules, *supra*.

“Affidavit.” See Order XXXVIII., Rule 6, and Order III. of these Rules, *supra*.

1. The party on whose behalf the deposition or affidavit is taken and filed is to print the same in the manner provided by Rule 2 of Order LVI. in the First Schedule to the Supreme Court of Judicature Act, 1875.

See Order IX., Rule 3, of the Chancery Orders.

“In the manner provided by Rule 2 of Order LVI.,” i.e., “on cream-wove machine drawing foolscap folio paper, 19 lbs. per mill ream, or thereabouts, in pica type, leaded, with an inner margin about three-quarters of an inch wide, and an outer margin about two inches and a half wide.”

2. To enable the party printing to print any deposition, the officer with whom it is filed shall on demand deliver to such party a copy written on draft paper on one side only.

Compare the Order in Chancery of the 16th of May, 1862, Rule 3. Copy for the printer is, as is well known, written “on one side only.”

3. The party printing shall, on demand in writing, furnish to any other party or his solicitor any number of printed copies, not exceeding ten, upon payment therefor at the rate of ONE PENNY PER FOLIO for one copy, and ONE HALFPENNY PER FOLIO for every other copy.

See the new Rule 20 of the Rules of the Supreme Court, June, 1876, cited at the end of the Schedule to Order VI. of these Rules. Under the former Chancery practice the defendant could demand ten printed copies

Order V.,
Aug. 12, 1875.

of the Bill (Chancery Order IX., Rule 5), at $\frac{1}{2}$ d. per folio (Chancery Order XL., Rule 19); and the plaintiff could demand one printed office copy of the Answer at 4d. per folio, and ten other printed copies at $\frac{1}{2}$ d. per folio (Chancery Order of 6th March, 1860, Rules 6, 7 and 8). Subject thereto, parties delivering to other parties, on demand, copies of the pleadings, were entitled to charge 4d. per folio (pauper parties charged and paid $1\frac{1}{2}$ d. per folio). Reg. as to Fees, Hil. T., 1860, IV., 1, 2, 3.

4. The solicitor of the party printing shall give credit for the whole amount payable by any other party for printed copies.

“Give credit,” i.e., to the party printing.

5. The party entitled to be furnished with a print shall not be allowed any charge in respect of a written copy, unless the Court or Judge shall otherwise direct.

Taken from Chancery Order XL., Rule 8, and the Chancery Order of March 6th, 1860, Rule 13.

6. The party by or on whose behalf any deposition, affidavit, or certificate is filed, shall leave a copy with the officer with whom the same is filed, who shall examine it with the original and mark it as an office copy; such copy shall be a copy printed as above provided where such deposition or affidavit is to be printed.

Taken from the Chancery Orders of the 6th of March, 1860, Rules 2 and 3, and of the 16th of May, 1864, Rule 3, and Chancery Order XXXVI., Rule 2.

“As above provided.” See Rule 1 of this Order, and Order LVI., Rule 2, *supra*.

The meaning of the last sentence of this Rule (which is rather obscure) is, that the copy left with the officer must be printed, when the original must be printed.

7. The party or solicitor who has taken any printed or written office copy of any deposition or affidavit is to produce the same upon every proceeding to which the same relates.

Copied from Chancery Order XXXVI., Rule 10.

8. Where any party is entitled to a copy of any deposi-

tion, affidavit, proceeding, or document, filed or prepared by or on behalf of another party, which is NOT REQUIRED TO BE PRINTED, such copy shall be furnished by the party by or on whose behalf the same has been filed or prepared. Order V.,
Aug. 12, 1875

Copied from Chancery Order XXXVI., Rule 5.

"Is not *required* to be printed." Every pleading, which contains less than ten folios of 72 words each, may be *either* printed or written. Order XIX., Rules 5 and 5a, *supra*.

By Order II. of these Rules, depositions and affidavits which have previously been used upon any proceeding without having been printed, need not be printed for use on the trial.

9. The party requiring any such copy, or his solicitor, is to make a written application to the party by whom the copy is to be furnished, or his solicitor, with an undertaking to pay the proper charges, and thereupon such copy is to be made and ready to be delivered at the expiration of TWENTY-FOUR HOURS after the receipt of such request and undertaking, or within such other time as the Court or Judge may in any case direct, and is to be furnished accordingly upon demand and payment of the proper charges.

Copied from Chancery Order XXXVI., Rules 4 and 6, "24" being substituted for "48" hours.

10. In the case of an *ex parte* application for an injunction or writ of *ne exeat regno*, the party making such application is to furnish copies of the affidavits upon which it is granted upon payment of the proper charges immediately upon the receipt of such written request and undertaking as aforesaid, or within such time as may be specified in such request, or may have been directed by the Court.

Copied from Chancery Order XXXVI., Rule 9.

As to *ex parte* applications for injunctions, see section 25, subs. (8), of the Principal Act, and Order LII., Rule 4, *supra*.

Order V.,
Aug. 12, 1875.

The writ of *ne exeat regno* is not now used for State purposes, but is a mere process in a Chancery suit, used to prevent one of the parties from withdrawing his person or property from the jurisdiction of the Court by going abroad, unless he shall first give security for the satisfaction of such claim as the other party shall establish.*

11. It shall be stated in a note at the foot of every affidavit filed on whose behalf it is so filed, and such note shall be printed on every printed copy of an affidavit or set of affidavits, and copied on every office copy and copy furnished to a party.

Partly taken from the Chancery Order of February 5th, 1861.

As to the cases in which affidavits are printed, see Order XXXVIII., Rule 6, and Order III. of these Rules, *supra*.

12. The name and address of the party or solicitor by whom any copy is furnished is to be endorsed thereon in like manner as upon proceedings in Court, and such party or solicitor is to be answerable for the same being a true copy of the original, or of an office copy of the original, of which it purports to be a copy, as the case may be.

Copied from Chancery Order XXXVI., Rule 8.

"In like manner as upon proceedings in Court." See Order IV., and Order XLII., Rule 11, *supra*.

13. The folios of all printed and written office copies, and copies delivered or furnished to a party, shall be numbered consecutively in the margin thereof, and such written copies shall be written in a neat and legible manner on the same paper as in the case of printed copies.

Copied from Chancery Order XXXVI., Rules 8 and 11.

"On the same paper as printed copies." *I.e.*, "on cream wove machine drawing foolscap folio paper, 19lbs. per mill ream, or thereabouts." Order LVI., Rule 2, and Rule 1 of this Order, *supra*.

14. In case any party or solicitor who shall be required to furnish any such written copy as aforesaid shall either refuse or, for twenty-four hours from the time when

* 2 Stephen's Comm., 504, 7th edn., n. (x.), citing Lord Bacon's Ordinances, No. 89; *Ex parte Brunker*, 3 P. W., 312; *Dick v. Swinton*, 1 Ves. and B., 373; *Goodman v. Sayers*, 5 Madd., 471.

the application for such copy has been made, neglect to furnish the same, the person by whom such application shall be made shall be at liberty to procure an office copy from the office in which the original shall have been filed, and in such case no costs shall be due or payable to the solicitor so making default in respect of the copy or copies so applied for.

Order V.,
Aug. 12, 1875

Copied from Chancery Order XXXVI., Rule 12.

"Required to furnish, as aforesaid." See Rule 9 of this Order, *supra*.

As to the costs of copies, see the Schedule to Order VI. of these Rules, *infra*.

15. Where, by any order of the Court (whether of Appeal or otherwise), or a Judge, any pleading, evidence, or other document is ordered to be printed, the Court or Judge may order the expense of printing to be borne and allowed, and printed copies to be furnished, by and to such parties and upon such terms as shall be thought fit.

As to ordering evidence to be printed for the Court of Appeal, see Order LVIII., Rule 12, *supra*.

COSTS.*

ORDER VI.

The following regulations as to costs of proceedings in the Supreme Court of Judicature shall regulate such costs from the commencement of the Supreme Court of Judicature Acts, 1873 and 1875:—

1. Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "LOWER SCALE" in the Schedule hereto—

Copied from the Chancery Regulations as to Fees, 1860.

* See, on this subject, Order LV. of the Rules of the Supreme Court, and the cases there cited, *supra*. See, also, Mr. Scott's little work on "Costs under the Judicature Acts, 1873 and 1875," and Waterlow's "Guide to the Preparation of Bills and Costs," 4th edn. (1877), which contain very useful PRECEDENTS OF TAXED BILLS.

Order VI.,
Aug. 12, 1875.

In all actions for purposes to which any of the FORMS OF INDORSEMENT OF CLAIMS ON WRITS OF SUMMONS IN SECTIONS II., IV., AND VII., IN PART II. OF APPENDIX (A.), referred to in the 3rd Rule of Order III., in the Schedule to the Supreme Court of Judicature Act, 1875, or other similar forms, are applicable (except as after provided in actions for injunctions*) :

The Sections referred to contain Common Law indorsements for debt and damages, &c., special and otherwise.

In all causes and matters by the 34th section of the Supreme Court of Judicature Act, 1873, assigned to the Queen's Bench Division of the Court ;

In all causes and matters by the 34th section of the said Act assigned to the Common Pleas Division of the Court ;

In all causes and matters by the 34th section of the said Act assigned to the Exchequer Division of the Court ;

In all causes and matters by the 34th section of the said Act assigned to the Probate, Divorce, and Admiralty Division of the Court.

Sir Robert Phillimore, on the 3rd of April, 1876, directed that the fees on the Higher Scale are to be allowed as a general rule (always open to exception) in Admiralty actions in the Probate, Divorce and Admiralty Division, as follows :—

In actions for salvage when £1,000 or upwards is awarded ;

In actions for damage by collision, to plaintiffs, when £1,000 or upwards is recovered, exclusive of interest ;

To defendants, when £2,000 or upwards is claimed by plaintiffs ;

But in any case in which the fees on the Higher Scale are sanctioned, the taxing officer is to exercise a discretion as to the extent to which those under the head of "Appearances," "Instructions," "Perusals," and "Attendances" are to be allowed.

And also in causes and matters by the 34th section of the said Act assigned to the Chancery Division of the Court in the following cases† (that is to say) :—

* See Rule 2 of this Order, *infra*.

† The words, "unless the Court shall make an order to the contrary," are here omitted, but see Rule 3 of this Order, *infra*.

By creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law or next-of-kin, in which the personal or real or personal and real estate for or against or in respect of which or for an account or administration of which the demand may be made shall be under the amount or value of £1,000.* Order VI.,
Aug. 12, 1875.

For the execution of trusts or appointment of new trustees in which the trust estate or fund shall be under the amount or value of £1,000.

For dissolution of partnership or the taking of partnership or any other accounts in which the partnership assets or the estate or fund shall be under the amount or value of £1,000.

For foreclosure or redemption, or for enforcing any charge or lien in which the mortgage whereon the suit is founded, or the charge or lien sought to be enforced, shall be under the amount or value of £1,000.

. And for specific performance in which the purchase-money or consideration shall be under the amount or value of £1,000.

. In all proceedings under the Trustees Relief Acts, or under the Trustee Acts, or under any of such Acts, in which the trust estate or fund to which the proceeding relates shall be under the amount or value of £1,000.

. In all proceedings relating to the guardianship or maintenance of infants, in which the property of

This was intended to meet a case where the debts might be £10,000, providing that if the estate be only £1,000, the taxation is to be on Lower Scale, in order to relieve suitors who have to deal with sums of smaller amount. Per Wood, V.C. (who had "a considerable share among" these provisions), in *The Earl of Stamford v. Dawson*, L. R., 1., 353, 356.

Order VI,
Aug. 12, 1878.

the infant shall be under the amount or value of £1,000.

8. In all proceedings by original special case, and in all proceedings relating to funds carried to separate accounts, and in all proceedings under any railway or private Act of Parliament, or under any other statutory or summary jurisdiction, and generally IN ALL OTHER CASES WHERE the estate or fund to be dealt with shall be UNDER THE AMOUNT OR VALUE OF £1,000.

Subsections 1, 2 (except as to new trustees), 4, 5, 6, 7, 8, are copied *verbatim* from the Chancery Regulations as to Fees, 1860.

In estimating the £1,000, the Court of Chancery looked at the amount in dispute when the bill was filed, not to the amount recovered; *Flockton v. Peaks**; *Re Reccet*†; *Cotterell v. Stratton*.‡

2. Solicitor (*sic*) shall be entitled to charge and be allowed the fees set forth in the column headed "HIGHER SCALE" in the Schedule hereto in all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property and infringement of rights, easements, patents and copyrights,§ and other similar cases where the procuring such injunction is the principal relief sought to be obtained, and IN ALL CASES OTHER THAN THOSE TO WHICH THE fees in the column headed "LOWER SCALE" are hereby made APPLICABLE.||

See the Chancery Regulations as to Fees, 1860, II., 2.

3. NOTWITHSTANDING THESE RULES, THE COURT OR JUDGE MAY IN ANY CASE DIRECT THE FEES SET FORTH IN EITHER OF THE SAID TWO COLUMNS TO BE ALLOWED TO ALL OR EITHER OR ANY OF THE PARTIES, AND AS TO ALL OR ANY PART OF THE COSTS.¶

* 12 W. R., 1025. † L. R., 2 Eq., 609. ‡ L. R., 9 Ch., 514.

§ See *Reade v. Bentley*, 3 K. and J., 271.

|| *E.g.*, in a case involving a question of equitable fraud: *The Earl of Stamford v. Dawson*, L. R., 4 Eq., 352.

¶ This discretion is meant to meet any possible case of hardship, which cannot be definitely struck at by the Rules. See per Wood, V.C., in *The Earl of Stamford v. Dawson*, L. R., 4 Eq., 352, 358.

4. The provisions of Order LXIII., in the First Schedule to the Supreme Court of Judicature Act, 1875, shall apply to these Rules. Order VI.,
Aug. 12, 1875.

Order LXIII. is the Interpretation Clause.

The SCHEDULE above referred to.

(An Order or Rule herein referred to by number shall mean the Order or Rule so numbered in the first Schedule to the Supreme Court of Judicature Act, 1875.)

| WRITS, SUMMONSES, AND WARRANTS. | | | | | | | Lower Scale. | | | Higher Scale. | | |
|--|--|--|--|--|--|--|--------------|----|----|---------------|----|----|
| | | | | | | | £ | s. | d. | £ | s. | d. |
| Writ of summons for the commencement of any action | | | | | | | 0 | 6 | 8 | 0 | 13 | 4 |
| And for endorsement of claim, if special* .. | | | | | | | 0 | 5 | 0 | 0 | 5 | 0 |
| Concurrent writ of summons | | | | | | | 0 | 6 | 8 | 0 | 6 | 8 |
| Renewal of a writ of summons | | | | | | | 0 | 6 | 8 | 0 | 6 | 8 |
| Notice of a writ for service in lieu of writ out of jurisdiction | | | | | | | 0 | 4 | 0 | 0 | 5 | 0 |
| Writ of inquiry | | | | | | | 1 | 1 | 0 | 1 | 1 | 0 |
| Writ of mandamus or injunction | | | | | | | 0 | 10 | 0 | 1 | 1 | 0 |
| Or per folio† | | | | | | | 0 | 1 | 4 | 0 | 1 | 4 |
| Writ of <i>subpœna ad testificandum duces tecum</i> .. | | | | | | | 0 | 6 | 8 | 0 | 6 | 8 |
| And if more than four folios, for each folio beyond four | | | | | | | 0 | 1 | 4 | 0 | 1 | 4 |
| Writ or writs of <i>subpœna ad testificandum</i> for any number of persons not exceeding three, and the same for every additional number not exceeding three | | | | | | | 0 | 6 | 8 | 0 | 6 | 8 |
| Writ of <i>distringas</i> , pursuant to statute 5 Vict. c. 8 ‡ | | | | | | | 0 | 13 | 4 | 0 | 13 | 4 |
| Writ of execution, or other writ to enforce any judgment or order | | | | | | | 0 | 7 | 0 | 0 | 10 | 0 |
| And if for more than four folios, for each folio beyond four | | | | | | | 0 | 1 | 4 | 0 | 1 | 4 |
| Procuring a writ of execution or notice to the sheriff, marked with a seal of renewal .. | | | | | | | 0 | 6 | 8 | 0 | 6 | 8 |
| Notice thereof to serve on sheriff | | | | | | | 0 | 4 | 0 | 0 | 5 | 0 |
| Any writ not included in the above | | | | | | | 0 | 7 | 0 | 0 | 10 | 0 |

* See Special Allowances, s. 1, *infra*.

† See *Ib.*, s. 12.

‡ It should be c. 5.

Schedule,
Aug. 13, 1875.

| | Lower Scale. | | | High Scale. |
|--|-----------------|----|----------------|----------------|
| | £ | s. | d. | £ |
| These fees include all endorsements and copies, or <i>præcipes</i> , for the officer sealing them, and attendances to issue or seal, but not the Court fees. | | | | |
| Summons to attend at Judge's chambers | 0 | 3 | 0 ^s | 0 |
| Or if special, at taxing officer's discretion, not exceeding.. .. | 0 | 6 | 8 | 1 |
| Copy for the Judge, when required.. .. | 0 | 2 | 0 | 0 |
| Or per folio | — | | | 0 |
| Original summons for proceedings in chambers in the Chancery Division | 0 | 13 | 4 | 1 |
| And attending to get same and duplicate scaled, and at the proper office to file duplicate and get copies for service stamped | 0 | 13 | 4 | 0 |
| Copy for the Judge | 0 | 2 | 0 | 0 |
| Or per folio | — | | | 0 |
| Endorsing same and copies under 8th Rule of the 35th of the Consolidated General Orders of the Court of Chancery | 0 | 6 | 8 | 0 |

SERVICES, NOTICES,† AND DEMANDS.

| | | | | |
|---|---|---|---|---|
| Service of any writ, summons, warrant, interrogatories, petition,‡ order, notice, or demand on a party who has not entered an appearance, and if not authorised to be served by post.. .. | 0 | 5 | 0 | 0 |
| If served at a distance of more than two miles from the nearest place of business, or office of the solicitor serving the same, for each mile beyond such two miles therefrom | 0 | 1 | 0 | 0 |
| Where in consequence of the distance of the party to be served, it is proper to effect such service through an agent (other than the London agent), for correspondence in addition .. | 0 | 7 | 0 | 0 |
| Where more than one attendance is necessary to effect service, or to ground an application for substituted service, such further allowance may be made as the taxing officer shall think fit. | | | | |
| For service out of the jurisdiction such allowance is to be made as the taxing officer shall think fit. | | | | |

* This sum does not include the sum of 1s. subsequently allowed for copy of the summons for service—"As to summons to attend at the Judge's chambers, for each copy to serve, 1s." 2 Charley's Cases (Chambers)

† See Special Indorsements, s. 6, *infra*.

‡ *Ib.*, s. 17.

ADDITIONAL RULES OF COURT.

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| | Lower Scale. | | | Higher Scale. | | | Schedule, Aug. 12, 1875. |
|---|-----------------|----|----|------------------|----|----|-----------------------------|
| | £ | s. | d. | £ | s. | d. | |
| Service where an appearance has been entered on the solicitor or party | 0 | 2 | 6 | 0 | 2 | 6 | |
| Or if authorised to be served by post | 0 | 1 | 6 | 0 | 1 | 6 | |
| Where any writ, order, and notice, or any two of them, have to be served together, one fee only for service is to be allowed. | | | | | | | |
| In addition to the above fees, the following allowances are to be made:— | | | | | | | |
| As to writs, if exceeding two folios, for copy for service, per folio beyond such two | 0 | 0 | 4 | 0 | 0 | 4 | |
| As to summons to attend at the Judges' Chambers for each copy to serve | 0 | 1 | 0* | 0 | 2 | 0 | |
| Or per folio | 0 | 0 | 4 | 0 | 0 | 4 | |
| As to notices in proceedings to wind up companies, for preparing or filling up each notice to cre- ditors to attend and receive debts, and to contri- butories to settle list of contributories .. | 0 | 1 | 0 | 0 | 1 | 0 | |
| And for preparing or filling up each notice to con- tributories to be served with a general order for a call, or an order for payment of a call .. | 0 | 1 | 0 | 0 | 1 | 0 | |
| And for drawing notice to be served on contribu- tories or creditors of a meeting, per folio .. | 0 | 1 | 0 | 0 | 1 | 0 | |
| For each copy of the last-mentioned notice to serve, per folio | 0 | 0 | 4 | 0 | 0 | 4 | |
| For preparing or filling up for service in any other cause or matter, each notice to creditors to prove claims, and each notice that cheques may be received, specifying the amount to be received for principal and interest, and costs, if any .. | 0 | 1 | 0 | 0 | 1 | 0 | |
| For preparing notice to produce or admit, and one copy | 0 | 5 | 0 | 0 | 7 | 6 | |
| If special or necessarily long, such allowance as the taxing officer shall think proper, not ex- ceeding per folio | 0 | 0 | 8 | 0 | 1 | 4 | |
| And for each copy beyond the first, such allowance as the taxing-master shall think proper, not exceeding per folio | 0 | 0 | 4 | 0 | 0 | 4 | |
| For preparing notice of motion | 0 | 2 | 0 | 0 | 5 | 0 | |
| Or per folio | 0 | 1 | 0 | 0 | 1 | 0 | |
| Copy for service | 0 | 1 | 0 | 0 | 1 | 0 | |

* This sum is not included in the sum of 3s. previously allowed for a "summons to attend at Judges' chambers." 2 Charley's Cases (Chambers), 72.

**Schedule,
Aug. 12, 1875**

| | Lower Scale. | | | High Scale. |
|---|-----------------|----|----|----------------|
| | £ | s. | d. | £ |
| Or per folio | — | | | 0 |
| For preparing any necessary or proper notice, not otherwise provided for and demand | 0 | 1 | 6 | 0 |
| Or if special, and necessarily exceeding three folios, for preparing same, for each folio beyond three | 0 | 1 | 0 | 0 |
| And for each copy for service, per folio beyond such three | 0 | 0 | 4 | 0 |
| Copies for service of interrogatories and petitions, and of orders with necessary notices (if any) to accompany, per folio | 0 | 0 | 4 | 0 |
| Except as otherwise provided, the allowances for services include copies for service. | | | | |
| Where notice of filing affidavits is required, only one notice is to be allowed for a set of affidavits filed, or which ought to be filed together. | | | | |
| In proceedings to wind up a company, the usual charges relating to printing shall be allowed in lieu of copies for service, where the fee for copies would exceed the charges for printing, and amount to more than £3. | | | | |
| Where any appointment is or ought to be ad- journed, service of a notice of the adjournment, or next appointment, is not to be allowed. | | | | |

APPEARANCES.*

| | | | | |
|---|---|---|---|---|
| Entering any appearance | 0 | 6 | 8 | 0 |
| If entered at one time, for more than one person, for every defendant beyond the first | 0 | 1 | 0 | 0 |
| If a person appearing to a writ of summons to recover land limits his defence by his memorandum of appearance, in addition to the above | 0 | 6 | 8 | 0 |

INSTRUCTIONS.†

| | | | | |
|--|---|----|---|-----|
| To sue or defend ‡ | 0 | 6 | 8 | 0 1 |
| For statement of complaint | 0 | 13 | 4 | 2 |
| For statement or further statement of defence .. | 0 | 6 | 8 | 0 1 |
| For counterclaim | 0 | 6 | 8 | 0 1 |
| For reply by plaintiff when defendant sets up a counterclaim | 0 | 13 | 4 | 1 |

* See Special Allowances, § 21, *infra*.
† See *ib.*, § 1, *infra*. See *ib.*, § 3, *infra*.

ADDITIONAL RULES OF COURT.

899

| | Lower Scale. £ s. d. | Higher Scale. £ s. d. | Schedule, Aug. 12, 1875. |
|---|----------------------------|-----------------------------|-----------------------------|
| For reply or further reply in any other case by plaintiff or other person, with or without joinder of issue | 0 6 8 | 0 13 4 | |
| For confession of defence | 0 6 8 | 0 13 4 | |
| For joinder of issue without other matter, and for demurrer | 0 6 8 | 0 13 4 | |
| For special case, special petition, any other pleading (not being a summons), and interrogatories for examination of a party or witness .. | 0 6 8 | 0 13 4 | |
| To amend any pleading | 0 6 8 | 0 13 4 | |
| For affidavits in answer to interrogatories, and other special affidavits* | 0 6 8 | 0 6 8 | |
| To appeal | 0 13 4 | 1 1 0 | |
| To add parties by order of Court or Judge .. | 0 6 8 | 0 13 4 | |
| For Counsel to advise on evidence when the evidence in chief is to be taken orally | 0 6 8 | 0 6 8 | |
| Or not to exceed | 0 13 4 | 1 1 0 | |
| For Counsel to make any application to a Court or Judge where no other brief | 0 6 8 | 0 10 0 | |
| For brief on motion for special injunction .. | 0 13 4 | 1 1 0 | |
| For brief on hearing or trial of action upon notice of trial given, whether such trial be before a Judge, with or without a Jury, or before an Official or Special Referee, or on trial of an issue of fact before a Judge, Commissioner, or Referee, or on assessment of damages .. | 1 1 0 | 2 2 0 | |
| For such brief, and for brief on the hearing of an appeal when witnesses are to be examined or cross-examined, such fee may be allowed as the taxing officer shall think fit, having regard to all the circumstances of the case, and to other allowances, if any, for attendances on witnesses and procuring evidence. | | | |
| The fees for instructions for brief are not to apply to a hearing on further consideration. | | | |

DRAWING PLEADINGS† AND OTHER DOCUMENTS.

| | | |
|------------------------------|--------|--------|
| Statement of claim | 0 10 0 | 1 1 0 |
| Or per folio | 0 1 0 | 0 1 0 |
| Statement of defence | 0 5 0 | 0 10 0 |
| Or per folio | 0 1 0 | 0 1 0 |

* See Special Allowances, § 1, *infra*.

† See *ib.*, § 1 and § 2, *infra*.

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Schedule,
Aug. 12, 1875.

| | Lower Scale. | | | Higher Scale. | | |
|--|-----------------|----|----|------------------|----|----|
| | £ | s. | d. | £ | s. | d. |
| Statement of defence and counterclaim | 0 | 5 | 0 | 1 | 1 | 0 |
| Or per folio | 0 | 1 | 0 | 0 | 1 | 0 |
| Reply, with or without joinder of issue, confession of defence, joinder of issue without other matter, demurrer, and any other pleading (not being a petition or summons) and amendments of any pleading | 0 | 5 | 0 | 0 | 10 | 0 |
| Or per folio | 0 | 1 | 0 | 0 | 1 | 0 |
| Particulars, breaches and objections, when re- quired, and one copy to deliver | 0 | 5 | 0 | 0 | 6 | 8 |
| Or such amount as the taxing officer shall think fit, not exceeding per folio | 0 | 0 | 8 | 0 | 1 | 4 |
| If more than one copy to be delivered, for each other copy per folio | 0 | 0 | 4 | 0 | 0 | 4 |
| Special case, whether original or in action, affi- davits in answer to interrogatories and other special affidavits,* special petitions, and inter- rogatories, per folio | 0 | 1 | 0 | 0 | 1 | 0 |
| Brief, on trial or hearing of cause, issue of fact, assessment of damages, examination of wit- nesses, demurrer, special case and petition before a Court or Judge, Sheriff, Commis- sioner, Referee, examiner, or officer of the Court, when necessary and proper in addition to pleadings, including necessary and proper observations, per folio | 0 | 1 | 0 | 0 | 1 | 0 |
| Brief on application to add parties | 0 | 6 | 8 | 0 | 10 | 0 |
| Or per folio | 0 | 1 | 0 | 0 | 1 | 0 |
| Brief on further consideration, per sheet of 10 folios | 0 | 6 | 8 | 0 | 6 | 8 |
| Accounts, statements, and other documents for the Judges' chambers, when required, and fair copy to leave, per folio | 0 | 0 | 8 | 0 | 1 | 4 |
| Advertisements to be signed by Judge's clerk, in- cluding attendance therefor | 0 | 6 | 8 | 0 | 13 | 4 |
| Bill of costs for taxation, including copy for the taxing officer | 0 | 0 | 8 | 0 | 0 | 8 |
| COPIES.† | | | | | | |
| Of pleadings, briefs, and other documents where no other provision is made, at per folio | 0 | 0 | 4 | 0 | 0 | 4 |

* See Special Allowances, § 1 and § 5, *infra*.

† See *ib.*, § 2 and § 16, *infra*.

| | Lower Scale. £ s. d. | Higher Scale. £ s. d. | Schedule, Aug. 12, 1875. |
|--|----------------------------|-----------------------------|-----------------------------|
| Where, pursuant to Rules of Court, any pleading, special case or petition of right, or evidence is printed, the solicitor of the party printing shall be allowed for a copy for the printer (except when made by the officer of the Court), at per folio | 0 0 4 | 0 0 4 | |
| And for examining the proof print, at per folio .. | 0 0 2 | 0 0 2 | |
| And for printing the amount actually and properly paid to the printer, not exceeding per folio*.. | 0 1 0 | 0 1 0 | |
| And, in addition, for every 20 beyond the first 20 copies, at per folio† | 0 0 1 | 0 0 1 | |
| And where any part shall properly be printed in a foreign language, or as a <i>fac simile</i> , or in any unusual or special manner, or where any alteration in the document being printed becomes necessary after the first proof, such further allowance shall be made as the taxing officer shall think reasonable. | | | |
| These allowances are to include all attendances on the printer. | | | |
| The solicitor for a party entitled to take printed copies shall be allowed, for such number of copies as he shall necessarily or properly take, the amount he shall pay therefor. | | | |
| In addition to the allowances for printing and taking printed copies, there shall be allowed for such printed copies as may be necessary or proper for the following, but for no other purposes (<i>videlicet</i>):— | | | |
| Of any pleading for delivery to the opposite party, or filing in default of appearance | | | |
| Of any special case for filing | | | |
| Of any petition of right for presentation, if presented in print, and for the solicitor of the Treasury, and service on any party | | | |
| Of any pleading, special case, or petition of right, for the use of the Court or Judge | | | |

* This is modified by Rule 20 of the Rules of the Supreme Court, June, 1876, thus: "For printing a document not exceeding ten folios, 10s."
† This is modified by Rule 20 of the Rules of the Supreme Court, June, 1876, thus: "And, in addition, for every 20 beyond the first 20 copies of any document, not exceeding 24 folios, 2s."

Schedule.
Aug. 12, 1878.

| | Lower Scale. | | | Hi li |
|--|-----------------|----|----|----------|
| | £ | s. | d. | ¢ |
| Of any affidavit to be sworn to in print | | | | |
| And of any pleading, special case, petition of right, or evidence for the use of Counsel in Court, and in country agency causes when proper to be sent as a close copy for the use of the country solicitor, at per folio | 0 | 0 | 2 | 0 |
| Such additional allowances for printed copies for the Court or Judge, and for Counsel, are not to be made where written copies have been made previously to printing, and are not in any case to be made more than once in the progress of the cause. | | | | |
| Close copies, whether printed or written, are not to be allowed as of course, but the allowance is to depend on the propriety of making or sending the copies, which in each case is to be shown and considered by the taxing officer. | | | | |
| Inserting amendments in a printed copy of any pleading, special case, or petition of right, when not reprinted | 0 | 1 | 0 | 0 |
| Or per folio | 0 | 0 | 4 | 0 |

PERUSALS*

| | | | | |
|---|---|---|---|---|
| Of statement of complaint, statement of defence, reply, joinder of issue, demurrer, and other pleading (not being a petition or summons) by the solicitor of the party to whom the same are delivered | 0 | 6 | 8 | 0 |
| Or per folio | — | | | 0 |
| Of amendment of any such pleading in writing .. | 0 | 6 | 8 | 0 |
| Or per folio | — | | | 0 |
| If same reprinted | 0 | 6 | 8 | 0 |
| Or per folio of amendment | — | | | 0 |
| Of interrogatories to be answered by a party by his solicitor | 0 | 6 | 8 | 0 |
| Or per folio | — | | | 0 |
| Of special case by the solicitor of any party, except the one by whom it is prepared | 0 | 6 | 8 | 0 |
| Or per folio | — | | | 0 |

* See Special Allowances, § 7, *infra*.

ADDITIONAL RULES OF COURT.

903

| | Lower Scale. £ s. d. | | | Higher Scale. £ s. d. | | | Schedule, Aug. 12, 1875. |
|---|----------------------------|---|---|-----------------------------|----|---|-----------------------------|
| Of copy order to add parties, notice of defendant's claim against any person not a party to the action under Order XVI., Rule 18, and of defendant's statement of defence and counter claim served on a person not a party under Order XXII., Rule 6, by the solicitor of the party served therewith, and in these several cases the perusal of the plaintiff's statement of complaint is also to be allowed, unless the solicitor has been previously allowed such perusal | 0 | 6 | 8 | 0 | 13 | 4 | |
| Or per folio | — | | | 0 | 0 | 4 | |
| Of notice to produce and notice to admit by the solicitor of the party served | 0 | 6 | 8 | 0 | 13 | 4 | |
| Of affidavit in answer to interrogatories by the solicitor of the party interrogating, and of other special affidavits by the solicitor of the party against whom the same can be read, per folio | 0 | 0 | 4 | 0 | 0 | 4 | |

ATTENDANCES.

| | | | | | | | |
|---|---|----|---|---|----|---|--|
| To obtain consent of next friend to sue in his name | 0 | 6 | 8 | 0 | 13 | 4 | |
| To deliver or file any pleading* (not being a petition or summons) and a special case | 0 | 3 | 4 | 0 | 6 | 8 | |
| To inspect, or produce for inspection, documents pursuant to a notice to admit | 0 | 6 | 8 | 0 | 13 | 4 | |
| Or per hour | 0 | 6 | 8 | 0 | 6 | 8 | |
| To examine and sign admissions | 0 | 6 | 8 | 0 | 13 | 4 | |
| To inspect, or produce for inspection, documents referred to in any pleading or affidavit, pursuant to notice under Order XXXI., Rule 14† | 0 | 6 | 8 | 0 | 6 | 8 | |
| Or per hour | 0 | 6 | 8 | 0 | 6 | 8 | |
| To obtain or give any necessary or proper consent | 0 | 6 | 8 | 0 | 6 | 8 | |
| To obtain an appointment to examine witnesses .. | 0 | 6 | 8 | 0 | 6 | 8 | |
| On examination of witnesses before any examiner, commissioner, officer, or other person | 0 | 13 | 4 | 0 | 13 | 4 | |
| Or, according to circumstances, not to exceed .. | 2 | 2 | 0 | 2 | 2 | 0 | |
| Or if without Counsel, not to exceed | — | | | 3 | 3 | 0 | |

* See Special Allowances, § 6, *infra*.

† See *ib.*, § 15, *infra*.

904 RULES OF THE SUPREME COURT (COSTS).

Schedule,
Aug. 12, 1875.

| | Lower Scale. £ s. d. | | | Higher Scale. £ s. d. | | |
|---|----------------------------|----|---|-----------------------------|----|---|
| On deponents being sworn, or by a solicitor or his clerk to be sworn, to an affidavit in answer to interrogatories or other special affidavit* .. | 0 | 6 | 8 | 0 | 6 | 8 |
| On a summons at Judges' chambers | 0 | 6 | 8 | 0 | 6 | 8 |
| Or according to circumstances, not to exceed† .. | 1 | 1 | 0 | 1 | 1 | 0 |
| In the Chancery Division, all allowances for attending at the Judges' chambers are to be by the Judge or chief clerk, as heretofore. | | | | | | |
| To file chief clerks' and taxing masters' certificates, and get copy marked as an office copy .. | 0 | 6 | 8 | 0 | 6 | 8 |
| On Counsel with brief or other papers— | | | | | | |
| If Counsel's fee one guinea | 0 | 3 | 4 | 0 | 6 | 8 |
| If more and under five guineas | 0 | 6 | 8 | 0 | 6 | 8 |
| If five guineas and under twenty guineas .. | 0 | 6 | 8 | 0 | 13 | 4 |
| If twenty guineas | 0 | 13 | 4 | 1 | 1 | 0 |
| If forty guineas or more | — | | | 2 | 2 | 0 |
| On consultation or conference with Counsel .. | 0 | 13 | 4 | 0 | 13 | 4 |
| To enter or set down action, demurrer, special case, or appeal, for hearing or trial | 0 | 6 | 8 | 0 | 6 | 8 |
| In Court on motion of course and on Counsel and for order | 0 | 10 | 0 | 0 | 13 | 4 |
| To present petition for order of course and for order .. | 0 | 6 | 8 | 0 | 13 | 4 |
| In Court on every special motion, each day .. | 0 | 6 | 8 | 0 | 13 | 4 |
| On same when heard each day | 0 | 13 | 4 | 0 | 13 | 4 |
| Or according to circumstances | 1 | 1 | 0 | 2 | 2 | 0 |
| On demurrer, special case, or special petition, or application adjourned from the Judges' chambers, when in the special paper for the day, or likely to be heard | 0 | 6 | 8 | 0 | 10 | 0 |
| On same when heard | 0 | 13 | 4 | 1 | 1 | 0 |
| Or according to circumstances, not to exceed .. | 1 | 1 | 0 | 2 | 2 | 0 |
| On hearing or trial of any cause, or matter, or issue of fact, in London, or Middlesex, or the town where the solicitor resides or carries on business, whether before a Judge with or without a Jury, or Commissioner, or Referee, or on assessment of damages, when in the paper .. | 0 | 10 | 0 | 0 | 10 | 0 |
| When heard or tried | 0 | 13 | 4 | 1 | 1 | 0 |
| Or according to circumstances | 2 | 2 | 0 | 2 | 2 | 0 |

* See Special Allowances, § 4 and § 5, *infra*.

† See *ib.*, § 10, § 11, and § 14, *infra*.

ADDITIONAL RULES OF COURT.

905

| | Lower Scale. £ s. d. | Higher Scale. £ s. d. | Schedule, Aug. 12, 1875. |
|--|----------------------------|-----------------------------|-----------------------------|
| When not in London or Middlesex, nor in the town where the solicitor resides or carries on business, for each day (except Sundays) he is necessarily absent | 2 2 0 | 3 3 0 | |
| And expenses (besides actual reasonable travelling expenses) each day, including Sundays .. | 1 1 0 | 1 1 0 | |
| Or if the solicitor has to attend on more than one trial or assessment at the same time and place, in each case | 1 1 0 | 1 11 6 | |
| The expenses in such case to be rateably divided. | | | |
| To hear judgment when same adjourned | 0 6 8 | 0 13 4 | |
| Or according to circumstances | 0 13 4 | 1 1 0 | |
| To deliver papers (when required) for the use of a Judge prior to a hearing | 0 6 8 | 0 6 8 | |
| If more than one Judge | 0 13 4 | 0 13 4 | |
| On taxation of a bill of costs | 0 6 8 | 0 6 8 | |
| Or according to circumstances, not to exceed .. | 2 2 0 | 2 2 0 | |
| In causes for purposes within the cognizance of the Court of Chancery before the Act passed, such further fee as the taxing officer may think fit, not exceeding the allowances heretofore made. | | | |
| To obtain or give an undertaking to appear .. | 0 6 8 | 0 6 8 | |
| To present a special petition, and for same answered | 0 6 8 | 0 6 8 | |
| On printer to insert advertisement in <i>Gazette</i> .. | 0 6 8 | 0 6 8 | |
| On printer to insert same in other papers, each printer | — | 0 6 8 | |
| Or every two | 0 6 8 | — | |
| On registrar to certify that a cause set down is settled, or for any reason not to come into the paper for hearing | 0 6 8 | 0 6 8 | |
| For an order drawn up by chief clerk, and to get same entered | 0 6 8 | 0 6 8 | |
| On Counsel to procure certificate that cause proper to be heard as a short cause, and on registrar to mark same | 0 6 8 | 0 6 8 | |
| To mark conveyancing Counsel or taxing master.. | 0 6 8 | 0 6 8 | |
| For preparing and drawing up an order made at chambers in proceedings to wind-up a company and attending for same, and to get same entered | 0 13 4 | 0 13 4 | |

906 RULES OF THE SUPREME COURT (COSTS).

Schedule,
Aug. 12, 1875.

| | Lower Scale. | | | Higher Scale. | | |
|---|-----------------|----|----|------------------|----|----|
| | £ | s. | d. | £ | s. | d. |
| And for engrossing every such order, per folio .. | 0 | 0 | 4 | 0 | 0 | 4 |

NOTE.—An order of course means an order made on an *ex parte* application, and to which a party is entitled as of right on his own statement and at his own risk.

OATHS AND EXHIBITS.

| | | | | | | |
|---|---|---|---|---|---|---|
| Commissioners to take oaths or affidavits. For every oath, declaration, affirmation, or attestation upon honour, in London or the country.. | 0 | 1 | 6 | 0 | 1 | 6 |
| The solicitor for preparing each exhibit in town or country | 0 | 1 | 0 | 0 | 1 | 0 |
| The Commissioner for marking each exhibit .. | 0 | 1 | 0 | 0 | 1 | 0 |

TERM FEES.

| | | | | | | |
|---|---|----|---|---|----|---|
| For every term commencing on the day the sittings in London and Middlesex of the High Court of Justice commence, and terminating on the day preceding the next such sittings, in which a proceeding in the cause or matter by or affecting the party, other than the issuing and serving the writ of summons, shall take place.. .. . | 0 | 15 | 0 | 0 | 15 | 0 |
| And further, in country agency causes or matters, for letters | 0 | 6 | 0 | 0 | 6 | 0 |
| Where no proceeding in the cause or matter is taken which carries a term fee, a charge for letters may be allowed, if the circumstances require it. | | | | | | |
| IN ADDITION to the above, an allowance is to be made for the necessary expense of POSTAGES, CARRIAGE AND TRANSMISSION OF DOCUMENTS. | | | | | | |

N.B.—The above Schedule is substituted alike for the First Schedule to the Chancery Regulations as to Fees, Hil. T., 1860, and the Schedule to the "Directions to the Masters," Hil. T., 1853

The Schedule to "The Rules of the Supreme Court (Costs)" is hereby altered in the following particulars:—
The allowance for printing a document not exceeding ten folios shall be 10s., and, in addition, for every twenty

beyond the first twenty copies of any document not exceeding twenty-four folios, 2s. Schedule,
Aug. 12, 1875.

This modification is made by the 20th Rule of the Rules of the Supreme Court, June, 1876. The modification falls under the head of "Copies" in the Schedule. The allowance previously stood, in all cases, thus:—

| | s. | d. | s. | d. |
|--|----|----|----|----|
| And for printing, the amount actually and properly paid to the printer, not exceeding, per folio | 1 | 0 | 1 | 0 |
| And in addition, for every 20 beyond the first 20 copies, at per folio | 0 | 1 | 0 | 1 |

SPECIAL ALLOWANCES AND GENERAL PROVISIONS.*

1. As to writs of summons requiring special indorsement, original special cases, pleadings and affidavits in answer to interrogatories, and other special affidavits, when the higher scale is applicable, the taxing officer may, in lieu of the allowances for instructions and preparing or drawing, make such allowance for work, labour, and expenses in or about the preparation of such documents as in his discretion he may think proper.

Adapted from the second Schedule to the Chancery Regulations as to Fees, Hil. T., 1860.

2. As to drawing any pleading or other document, the fees allowed shall include any copy made for the use of the solicitor, agent, or client, or for Counsel to settle.

Copied from the second Schedule to the Chancery Regulations as to Fees, Hil. T., 1860.

3. As to instructions to sue or defend, when the Higher Scale is applicable, if in consequence of the instructions being taken separately from more than three persons (not being co-partners) the taxing officer shall consider the fee above provided inadequate, he may make such further allowance as he shall in his discretion consider reasonable.

Compare Chancery Order XL., Rule 12.

4. As to affidavits, when there are several deponents to be sworn, or it is necessary for the purpose of an affidavit

* See Morgan & Chute's Chancery Acts and Orders, 5th edn. [1876], pp. 629-641, and the cases there cited.

cial
ances,
4.

being sworn to go to a distance, or to employ an agent, such reasonable allowance may be made as the taxing officer in his discretion may think fit.

5. The allowances for instructions and drawing an affidavit in answer to interrogatories and other special affidavits, and attending the deponent to be sworn, include all attendances on the deponents to settle and read over.

6. As to delivery of pleadings, services, and notices, the fees are not to be allowed when the same solicitor is for both parties, unless it be necessary for the purpose of making an affidavit of service.

Copied from the second Schedule to the Chancery Regulations as to Fees, Hil. T., 1860.

7. As to perusals, the fees are not to apply where the same solicitor is for both parties.

Copied from the second Schedule to the Chancery Regulations as to Fees, Hil. T., 1860.

8. As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed.

Copied from Chancery Order XL., Rule 32. See, as to the solicitor's travelling expenses in a Chancery suit, *Clark v. Malpas*,* *Howell v. Tyler*,† and as to the costs of examining witnesses abroad, *Wentworth v. Lloyd*.‡

9. As to agency correspondence, in country agency causes and matters, if it be shown to the satisfaction of the taxing officer that such correspondence has been special and extensive, he is to be at liberty to make such special allowance in respect thereof as in his discretion he may think proper.

Taken from the second Schedule to the Chancery Regulations Hil. T., 1860, as to Fees.

10. As to attendances at the Judges' chambers, whether from the length of the attendance, or from the difficulty

* 31 Beav., 554.

† 2 Y & C., 284.

‡ 34 Beav., 455.

of the case, the Judge or Master shall think the highest of the above fees an insufficient remuneration for the services performed, or where the preparation of the case or matter to lay it before the Judge or Master in chambers, or on a summons, shall have required skill and labour for which no fee has been allowed, the Judge or Master may allow such fee in lieu of the fee of £1. 1s. above provided, not exceeding £2. 2s., or where the higher scale is applicable, £3. 3s., or in proceedings to wind up a company, £5. 5s., as in his discretion he may think fit; and where the preparation of the case or matter to lay it before a Judge at chambers on a summons shall have required and received from the solicitor such extraordinary skill and labour as materially to conduce to the satisfactory and speedy disposal of the business, and therefore shall appear to the Judge to deserve higher remuneration than the ordinary fees, the Judge may allow to the solicitor, by a memorandum in writing expressly made for that purpose and signed by the Judge, specifying distinctly the grounds of such allowance, such fee, not exceeding ten guineas, as in his discretion he may think fit, instead of the above fees of £2. 2s., £3. 3s., and £5. 5s.

Special
Allowances,
\$10.

Copied *verbatim* from the second Schedule to the Chancery Regulations as to Fees of Hil. T., 1860; £2. 2s. and £3. 3s. being substituted for £1. 1s. and £2. 2s., and £5. 5s. added as to winding up.

11. As to attendances at the Judges' chambers, where by reason of the non-attendance of any party (and it is not considered expedient to proceed *ex parte*), or where by reason of the neglect of any party in not being prepared with any proper evidence, account, or other proceeding, the attendance is adjourned without any useful progress being made, the Judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending by the party so absent or neglectful, or by his solicitor personally; and the party so absent or neglectful is not to be allowed any fee as against any other

Special
Allowances,
§ 11.

party, or any estate or fund in which any other party is interested.

Copied partly from Chancery Order XL., Rule 31.

12. A folio is to comprise seventy-two words, every figure comprised in a column being counted as one word.

This is copied from the Chancery Regulations as to Fees, IV., 4.

13. Such costs of procuring the advice of Counsel on the pleadings, evidence, and proceedings in any cause or matter as the taxing officer shall in his discretion think just and reasonable, and of procuring Counsel to settle such pleadings and special affidavits as the taxing officer shall in his discretion think proper to be settled by Counsel, are to be allowed; but as to affidavits, a separate fee is not to be allowed for each affidavit, but one fee for all the affidavits proper to be so settled, which are or ought to be filed at the same time.

Taken partly from the Directions to the Masters, Rule 4, and Chancery Order XL., Rule 17.

14. As to Counsel attending at Judges' chambers, no costs thereof shall in any case be allowed, unless the Judge certifies it to be a proper case for Counsel to attend.*

This is copied *verbatim* from the Directions to the Masters, Rule 5, and Chancery Order XL, Rule 29.

15. As to inspection of documents under Order XXXI., Rule 14, no allowance is to be made for any notice or inspection, unless it is shown to the satisfaction of the taxing officer that there were good and sufficient reasons for giving such notice and making such inspection.

16. As to taking copies of documents in possession of another party, or extracts therefrom, under Rules of Court or any special order, the party entitled to take the copy or

* Except in applications for time, Counsel will be allowed at the Rolls chambers, as of course, without a certificate, unless special directions be given to the contrary. *Webb v. Fitzgerald*, W. N., 1875, p. 244; 1 Charley's Cases (Court), 182.

extract is to pay the solicitor of the party producing the document for such copy or extract as he may, by writing, require, at the rate of 4d. per folio; and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof.

Special
Allowances,
§ 16.

4d. was the amount charged by the Record and Writs' clerks for copies. Regul. as to Fees, Sch. 4. No fee was payable for *taking* copies. Daniel's Chancery Practice, p. 1698.

17. Where a petition in any cause or matter assigned to the Chancery Division is served, and notice is given to the party served that in case of his appearance in Court his costs will be objected to, and accompanied by a tender of costs for perusing the same, the amount to be tendered shall be £2. 2s. The party making such payment shall be allowed the same in his costs, provided such service was proper, but not otherwise; but this order is without prejudice to the rights of either party to costs, or to object to costs where no such tender is made, or where the Court or Judge shall consider the party entitled, notwithstanding such notice or tender, to appear in Court. In any other case for which a solicitor of a party served necessarily or properly peruses any such petition without appearing thereon, he is to be allowed a fee not exceeding £2. 2s.

See *Roberts v. Ball*,* *Wood v. Boucher*,† *Re Duggan*,‡ 40s. is the amount usually tendered, Daniel's Chancery Practice.§

18. The Court or Judge may, at the hearing of any cause or matter, or upon any application or procedure in any cause or matter in Court or at chambers, and whether the same is objected to or not, direct the costs of any pleading, affidavit, evidence, notice to cross-examine witnesses,

* 24 L. J. (Ch.), 471.
‡ L. R., 8 Eq., 697.

† 19 W. R., 234.)
§ P. 1460, n. (g).

General
Provisions,
§ 18.

account, statement, or other proceeding, or any part thereof, which is improper, unnecessary, or contains unnecessary matter, or is of unnecessary length, to be disallowed, or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, or to contain unnecessary matter, or to be of unnecessary length; and in such case the party whose costs are so disallowed shall pay the costs occasioned to the other parties by such unnecessary proceeding, matter, or length; and in any case where such question shall not have been raised before and dealt with by the Court or Judge, the taxing officer may look into the same (and, as to evidence, although the same may be entered as read in any decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so.

This is an improved version of Chancery Order XL., Rules 9 and 10, the last sentence being new; see *Re Farington*.*

19. In any case in which, under the preceding Rule No. 18, or any other Rule of Court, or by the order or direction of a Court or Judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set off, or may, if he shall think fit, delay the allowance of the costs, such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered.

Setting off costs against costs in same suit, is in accordance with the former practice. Daniel's Chancery Practice.†

20. Where in the Chancery Division any question as to any costs is under the preceding Rule 18 dealt with at Chambers, the Chief Clerk is to make a note thereof and

* 33 Beav., 246.

† P. 1269.

state the same on his allowance of the fees for attendances at chambers, or otherwise as may be convenient for the information of the taxing officer.

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Provisions,
§ 20.**

This is copied from Chancery Order XL., Rule 10.

21. Where any party appears upon any application or proceeding in Court or at chambers, in which he is not interested, or upon which, according to the practice of the Court, he ought not to attend, he is not to be allowed any costs of such appearance unless the Court or Judge shall expressly direct such costs to be allowed.

Compare Chancery Order XL., Rule 28 ; and Rule 24, *infra*.

22. As to applications to extend the time for taking any proceeding limited by Rules of Court (subject to any special order as to the costs of and occasioned by any such application), the costs of one application are, without special order, to be allowed as costs in the cause or matter, but (unless specially ordered) no costs are to be allowed of any further application to the party making the same as against any other party, or any estate or fund in which any other party is interested.

See, on this, Order LVII., Rule 6, *supra*, and Chancery Order XXXVII., Rules 17 and 18.

23. The taxing officers of the Supreme Court, or of any Division thereof, shall, for the purpose of any proceeding before them, have power and authority to administer oaths, and shall, in relation to the taxation of costs, perform all such duties as have heretofore been performed by any of the masters, taxing masters, registrars, or other officers of any of the Courts whose jurisdiction is by the Act transferred to the High Court of Justice or Court of Appeal, and shall, in respect thereof, have such powers and authorities as previous to the commencement of the Act were vested in any of such officers, including examining

**General
Provisions,
§ 23.**

witnesses, directing production of books, papers, and documents, making separate certificates or *allocaturs*, requiring any party to be represented by a separate solicitor, and to direct and adopt all such other proceedings as could be directed and adopted by any such officer on references for the taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the Court or a Judge.

This is partly copied from the Chancery Order XV., Rule 1.

As to the powers of the taxing masters in Chancery generally, see *Clayton v. Meadows*,* and *Re Atkinson*.†

24. The taxing officer shall have authority to arrange and direct what parties are to attend before him on the taxation of costs to be borne by a fund or estate, and to disallow the costs of any party whose attendance such officer shall in his discretion consider unnecessary in consequence of the interest of such party in such fund or estate being small or remote, or sufficiently protected by other parties interested.

Compare Rule 21, *supra*, and see *Stahlschmidt v. Lett*,‡ as to the exercise of this discretion.

25. When any party entitled to costs refuses or neglects to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the taxing officer shall be at liberty to certify the costs of the other parties, and certify such refusal or neglect, or may allow such party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by such refusal or neglect.

26. As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment

* 2 Hare, 32.

† 26 Beav., 51.

‡ 9 W. R., 830.

of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through overcaution, negligence, or mistake, or merely at the desire of the party.

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Provisions,
§ 26.

This is copied *verbatim* from Chancery Order XL., Rule 32.

27. As to any work and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed.

This is copied from the Regulations of Hil. T., 1860, as to Fees, second Schedule.

28. The RULES, ORDERS, and PRACTICE OF ANY COURT WHOSE JURISDICTION IS TRANSFERRED to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the Act, shall, in so far as they are NOT INCONSISTENT with the Act and the Rules of Court in pursuance thereof, REMAIN IN FORCE and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal.

This is a very important saving clause. See the Chancery Order XL.,* and the Directions to the Masters of the Court, Hil. T., 1853;† the Reg. Gen. of the Court of Admiralty, 1859, Rules 119 to 123; and Reg. Gen. of the Court of Probate, Rules 92 to 95.

29. As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and Counsel, if any, in respect

* Morgan & Chute's Chancery Acts and Orders, p. 575, 4th Edn.

† Day's Common Law Procedure Acts, p. 534.

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Provisions,
§ 29.

of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances.

Fees to Counsel are generally left to the taxing master's discretion; 6 Beav., 454; 13 W. R., 1056; 1 K. & J., 220. See, also, as to solicitor's fees, Chancery Order XL., Rule 37.

30. Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any item or items, may, at any time before the certificate or *allocatur* is signed, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the item or items, or parts or part thereof objected to, and may thereupon apply to the taxing officer to review the taxation in respect of the same.

This is copied *verbatim* from the Chancery Order XL., Rule 33, "or *allocatur*" being added.

31. Upon such application the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or *allocatur*, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto.

This is copied *verbatim* from the Chancery Order XL., Rule 34.

"Review his taxation." By Order LIV., Rule 2, the Masters of the Queen's Bench, Common Pleas, and Exchequer Divisions are not to "review taxation of costs." But this applies only to a Master reviewing the taxation of another Master.

32. Any party who may be dissatisfied with the certificate or *allocatur* of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may apply to a Judge at chambers for an order to review the taxation as to the same item or part of an item, and the Judge may thereupon make such order as to the Judge may seem just; but the certificate or *allocatur* of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.*

General
Provisions,
§ 32.

This is copied from the Chancery Order XL., Rule 35, "or *allocatur*" being added, and the application need not have been to the Judge who made the order for taxation.

Questions of taxation specially left to a taxing master's discretion are not subject to reviewal. See L. R., 1 Ex., 54; L. R., 3 Q. B., 54; L. R., 4 C. P., 76.

The items alleged to have been improperly allowed or disallowed must be specified. *Re Congreve*.†

33. Such application shall be heard and determined by the Judge upon the evidence which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof, unless the Judge shall otherwise direct.

Copied *verbatim* from the Chancery Order XL., Rule 36.

34. When a writ of summons for the commencement of an action shall be issued from a district, and when an action proceeds in a District Registry, all fees and allowances, and rules and directions relating to costs, which would be applicable to such proceeding if the writ of summons were issued in London, and if the action proceeded in London,

* After the Master's *allocatur*, no objection can be taken to the taxation of costs. Application should be made, under s. 30, to the Master, before the *allocatur* is signed, to review his taxation, in order to entitle the parties dissatisfied with it to appeal to a Judge at chambers, under § 32. 1 Charley's Cases (Chambers), 130. Per Lush, J., at chambers.

† 4 Beav., 87.

918 RULES OF THE SUPREME COURT (COSTS).

**General
Provisions,
§ 34.**

shall apply to such writ of summons issued from and other proceedings in the District Registry.*

| | |
|-------------------------|---------------------------|
| <i>Cairns, C.</i> | <i>John Mellor.</i> |
| <i>A. E. Cockburn.</i> | <i>Robt. Lush.</i> |
| <i>G. Jessel.</i> | <i>Wm. Baliol Brett.</i> |
| <i>Coleridge.</i> | <i>A. Cleasby.</i> |
| <i>Fitzroy Kelly.</i> | <i>W. R. Grove.</i> |
| <i>W. M. James.</i> | <i>J. R. Quain.</i> |
| <i>George Mellish.</i> | <i>James Hannen.</i> |
| <i>Richd. Malins.</i> | <i>C. E. Pollock.</i> |
| <i>James Bacon.</i> | <i>W. V. Field.</i> |
| <i>Charles Hall.</i> | <i>J. W. Huddleston.</i> |
| <i>G. Bramwell.</i> | <i>Nathaniel Lindley.</i> |
| <i>Colin Blackburn.</i> | |

* As to writs of summons issued out of, and other proceedings in District Registries, see the note to Order XXXV., Rule 1a, *supra*, where the practice in relation to these points is briefly recapitulated. By Order LIV., Rule 3, *supra*, "where final judgment is entered in a District Registry, costs shall be taxed in such Registry, unless the Court or a Judge shall otherwise order."

DISTRICT REGISTRIES.*

2nd Order in
Council,
Aug. 12, 1875.

SECOND ORDER IN COUNCIL, OF 12TH AUGUST, 1875.†

At the Court at Osborne House, Isle of Wight, the
12th day of August, 1875.

PRESENT,

The QUEEN'S Most Excellent Majesty in Council.

WHEREAS by "The Supreme Court of Judicature Act, 1873," it is enacted that it shall be lawful for Her Majesty, by Order in Council, from time to time to direct that there shall be District Registrars in such places as shall be in such Order mentioned for districts to be thereby defined, from which writs of summons for the commencement of actions in the High Court of Justice may be issued, and in which such proceedings may be taken and recorded, as are hereinafter mentioned, and Her Majesty may thereby appoint that any Registrar of any County Court, or any Registrar or Prothonotary or District Prothonotary of any local Court whose jurisdiction is hereby transferred to the said High Court of Justice, or from which an appeal is hereby given to the said Court of Appeal, or any person who, having been a District Registrar of the Court of Probate, or of the Admiralty Court, shall under this Act become and be a District Registrar of the said High Court of Justice, or who shall hereafter be appointed such District Registrar, shall and may be a District Registrar of the said High Court for the purpose of issuing such writs as aforesaid, and having such proceedings taken before him as are hereinafter mentioned :

* See, as to the subject-matter of this Order in Council, ss. 60 to 66 of the Principal Act; s. 13 of the Amending Act; Order V., Rules 1, 2, and 3; Order XII., Rules 2, 3, 4, 5, and 6a; Order XIII., Rule 6a; Order XXXV.; and Order LXI., Rule 4a, *supra*.

† From the *London Gazette* of the 24th of August, 1875.

2nd Order in
Council,
Aug. 12, 1875.

And whereas by "The Supreme Court of Judicature Act, 1875," it is provided that where any such Order has been made, two persons may, if required, be appointed to perform the duties of District Registrar in any district named in the Order, and such persons shall be deemed to be joint District Registrars, and shall perform the said duties in such manner as may from time to time be directed by the said Order, or any Order in Council amending the same :

And whereas it has seemed fit to Her Majesty, by and with the advice of Her Privy Council, that there should be District Registrars in certain places in England: Now, therefore, Her Majesty, by and with the advice aforesaid, is pleased to order, and it is hereby ordered, as follows:—

That there shall be District Registrars in the places of LIVERPOOL, MANCHESTER, and PRESTON, and the DISTRICT REGISTRAR AT LIVERPOOL OF THE HIGH COURT OF ADMIRALTY and the DISTRICT PROTHONOTARY at Liverpool of the Court of Common Pleas of Lancaster, shall be and are hereby appointed the District Registrars in Liverpool;* and the DISTRICT PROTHONOTARY at MANCHESTER of the said Court of Common Pleas shall be and is hereby appointed the District Registrar in Manchester; and the DISTRICT PROTHONOTARY at PRESTON of the said Court of Common Pleas shall be and is hereby appointed the District Registrar at Preston; and that the district for each such place shall be the district now assigned to each such District Prothonotary, under the provisions and authority of "The Common Pleas at Lancaster Amendment Act, 1869."

That there shall be a District Registrar in DURHAM, and that the DISTRICT PROTHONOTARY of the Court of Pleas at Durham shall be and is hereby appointed the District Registrar in Durham; and that the district shall be the district, for the time being, of the County Court holden at Durham.

* Under s. 13 of the Supreme Court of Judicature Act, 1875, *supra*.

That, in the places mentioned in the Schedule annexed, there shall be District Registrars, and that the REGISTRAR OF THE COUNTY COURT held in any such place shall be and is hereby appointed the District Registrar in such place, and that the district for each such place shall be the district, for the time being, of the County Court holden at such place.

C. L. PEEL.

SCHEDULE.

List of District Registries and Registrars:—

- | | |
|-------------------------------------|---|
| * BANGOR (Jones, H. L.) | * KINGSTON-ON-HULL (Phillips, C. H., and Rollit, A. K.) |
| BARNLEY (Bury, R.) | * KING'S LYNN (Partridge, F. R.) |
| * BARNSTAPLE (Bencraft, L. T.) | LEEDS (Marshall, T.) |
| BEDFORD (Pearse, J.) | LEICESTER (Ingram, T.) |
| BIRKENHEAD (Williams, J. R.) | LINCOLN (Appleby, F.) |
| BIRMINGHAM (Cole, J., and E. Parry) | * LOWESTOFT (Chater, W.) |
| * BOSTON (Staniland, R. W.) | MAIDSTONE (Scudamore, F.) |
| BRADFORD (Robinson, G.) | * NEWCASTLE-UPON-TYNE (Mortimer, W. B.) |
| * BRIDGEWATER (Lovibond, H.) | * NEWPORT, MONMOUTH (Roberts, W., and Davis, H. J.) |
| * BRIGHTON (Evershed, E.) | NEWPORT, ISLE OF WIGHT (Blake, F.) |
| * BRISTOL (Harley, E.) | NEWTOWN (Talbot, J. A.) |
| BURY ST. EDMUNDS (Collins, T.) | NORTHAMPTON (Dennis, W.) |
| CAMBRIDGE (Eaden, J.) | NORWICH (Cooke, G. F.) |
| * CARDIFF (Langley, R. F.) | NOTTINGHAM (Patchitt, E.) |
| CARLISLE (Halton, H. J.) | OXFORD (Bishop, C.) |
| * CARMARTHEN (Lloyd, W.) | PEMBROKE DOCK (Owen, S. H.) |
| CHELTENHAM (Gale, C. F.) | PETERBOROUGH (Gaches, W. D.) |
| CHESTER (Williamson, S.) | * POOLE (Dickinson, H. W.) |
| * COLCHESTER (Barnes, J. S.) | * PORTSMOUTH (Howard, J.) |
| DERBY (Weller, G. H.) | * RAMSGATE (Snowden, T. H. G.) |
| DEWSBURY (Tennant, C. A.) | * ROCHESTER (Hayward, W. W.) |
| * DOVER (Fielding, G.) | SHEFFIELD (Wak, W., & Rogers, W. T.) |
| * DORCHESTER (Symonds, G.) | SHREWSBURY (Peel, C.) |
| DUDLEY (Walker, T.) | * SOUTHAMPTON (Daw, jun., J.) |
| * DURHAM (Ward, W. C.) | * STOCKTON-ON-TEES (Crosby, T.) |
| * EAST STONEHOUSE (Edmonds, R. G.) | * SUNDERLAND (Ellis, R. K. A.) |
| * EXETER (Daw, R. R. M.) | * SWANSEA (Jones, J.) |
| * GLOUCESTER (Wilton, F.) | * TRURO (Chilcot, J. G.) |
| * GREAT GRIMSBY (Daubney, W. H.) | * TOTNES (Bryett, T.) |
| * GREAT YARMOUTH (Worlledge, E. W.) | WAKEFIELD (Mason, H.) |
| HALIFAX (Rankin, M. H.) | WALSALL (Clarke, F. F.) |
| HANLEY (Tennant, A.) | * WHITEHAVEN (Were, A. B.) |
| * HARTLEPOOL (Strover, J. B.) | WOLVERHAMPTON (Saunders, F.) |
| HEREFORD (Reynolds, J. J.) | WORCESTER (Crisp, H.) |
| HUDDERSFIELD (Jones, jun., F. R.) | YORK (Perkins, R.) |
| * IPSWICH (Grimsey, B. P.) | |

* The asterisk indicates the towns the County Courts of which have Admiralty jurisdiction.

• Mr. E. Worthington, the District Prothonotary at (pursuant to the above Order) appointed District Registrar. Mr. Worthington dying in 1876, the office of District Registrar was abolished by the Lord Chancellor, with the concurrence (see the Order in Council of December 9th, 1876, *infra*) the language of s. 78 of the Principal Act—"the Prothonotaries AND THEIR SUCCESSORS."

† The writer has to thank Mr. Henry Nicol, super-County Courts Department at the Treasury, for kindly a list of District Registrars, now added to the original. He has Mr. Nicol's authority for stating that the proper title of a District Registrar is by his official title, thus:—

"The District Registrar of the High Court of Justice as the case may be.

COURT FEES.

1st Order,
Oct. 28, 1875.

ORDER

OF THE 28TH OF OCTOBER, 1875.*

THE Right Honorable Hugh MacCalmont Baron Cairns, Lord High Chancellor of Great Britain, by and with the advice and consent of the undersigned Judges of the Supreme Court, and with the concurrence of the Lords Commissioners of Her Majesty's Treasury, doth hereby in pursuance and execution of the powers given by the Supreme Court of Judicature Act, 1875 †, and all other powers and authorities enabling him in this behalf, order and direct in manner following:—

RULE I.

The fees and percentages contained in the Schedule hereto are fixed and appointed to be, and shall be taken in the High Court of Justice, and in the Court of Appeal, and in any Court to be created by any Commission, and in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, and by any officer paid wholly or partly out of public moneys who is attached to any of those Courts or the Supreme Court, or any Judge of those Courts, or any of them; and the said fees and percentages shall be taken by stamps,‡ except those taken in the

* This Order is binding on all the Courts, offices and officers, to which it refers, in the same manner as if it had been enacted by Parliament.

† Section 26, *supra*.

‡ See the Orders, as to taking fees and percentages by stamps, of the 28th of October, 1875, and the 22nd of April, 1876, *infra*.

Rule I,
Oct. 28, 1875.

District Registries, which shall, until further order, be taken in money, and applied and accounted for in such manner as the Treasury may from time to time direct.

RULE II.

The fees and percentages set forth in the column headed "LOWER SCALE" in the Schedule hereto are to be taken and paid in all cases in which the Lower Scale of fees is to be charged and allowed to solicitors under the provisions of the Additional Rules of Court under the Supreme Court of Judicature Act, 1875, issued by Order in Council, dated the 12th day of August, 1875,* and the fees and percentages set forth in the column headed "HIGHER SCALE" in the Schedule hereto are to be taken and paid in all other cases.

RULE III.

In causes and matters by the 34th section of the Supreme Court of Judicature Act, 1873, assigned to the Chancery Division :—

The solicitor or party acting in person shall, on any proceeding in which he claims to pay fees according to the Lower Scale, file with the proper officer a certificate in the form hereunder set forth, of which certificate the officer is, at the request of any solicitor or any party acting in person in the cause or matter, to mark a copy without a fee.

On production of such copy of the certificate all officers of the Court are to receive and file all proceedings in the cause or matter bearing stamps according to the Lower Scale.

In any case certified for the Lower Scale of Court Fees in which it shall happen that the solicitor shall become entitled to charge and be allowed according to the Higher

* The Rules of the Supreme Court (Costs), Order VI., Schedule, *supra*.

Scale of solicitors' fees, the deficiency in the fees of Court is to be made good.

Rule III.
Oct. 28, 1875.

In any case in which the fees have been paid upon the Higher Scale, and in which it shall happen that the solicitor shall become entitled to charge and be allowed only according to the Lower Scale of Solicitors' fees, the excess of fees so paid may be allowed upon the taxation of costs, if the circumstances of the case shall, in the judgment of the taxing officer, justify such allowance.

RULE IV.

The provisions in this Order shall not apply to or affect any of the matters following (that is to say) :—

The existing fees and percentages in respect of any of the jurisdictions which are not, by the Supreme Court of Judicature Acts, 1873 and 1875, transferred to the High Court of Justice or the Court of Appeal;*

The existing fees and percentages in respect of any matter at the time of the passing of the Supreme Court of Judicature Act, 1875, within the jurisdiction of the Court of Probate, the Court for Divorce and Matrimonial Causes, or the Admiralty Court, or relating to any appeal from the Chief Judge in Bankruptcy, except so far as the procedure in any such matter, or the fees or percentages to be taken in respect thereof, is or are expressly varied by the Schedule to the said Act, or by this Order, or by any Rules of Court made or to be made by Order in Council before the commencement of the said Act.

The existing fees and percentages in respect of any criminal proceedings,† other than such proceedings on the Crown side of the Queen's Bench Division‡ as the scale contained in the Schedule hereto may be applicable to;

* *H. g.*, the jurisdiction of the Court of Bankruptcy.

† See Order LXII., *supra*.

‡ *Ibid*.

**Rule IV.,
Oct. 20, 1875.**

The existing fees and percentages in respect of matters on the Revenue side of the Exchequer Division,*and proceedings and business in the office of the Queen's Remembrancer† other than such matters, proceedings, and business as the scale contained in the Schedule hereto may be applicable to ;

The existing fees and percentages authorised to be taken by any sheriffs, under sheriffs, deputy sheriffs, bailiffs, or other officers or ministers of sheriffs ;

The existing fees and percentages directed to be taken or paid by any Act of Parliament, and in respect of which no fee or percentage is hereby provided ;

The existing fees and percentages which shall have become due or payable before the commencement of the [Supreme Court of] Judicature Acts, 1873 and 1875 ;

The existing fees and percentages in respect of any proceedings in any cause or matter pending at the commencement of the said Acts, and in respect of which no fee or percentage is hereby provided.

In pending suits the old scale of fees applies where the taking of accounts *commenced* before the 1st of November, 1875, even though the accounts may not have been actually completed and certified before that date. The new scale of fees applies where the taking of accounts *commenced* after that date.‡

The taxing-master's percentage on costs is to be according to the new scale, in all cases in which the costs have been *taxed* before the 1st of November, 1875.§

* See Order LXII., *supra*.

† See s. 77 of the Principal Act, *supra*.

‡ *Meredith v. Treffry*, 45 L. J. (Ch.), 162; 33 L. T., 715; 24 W. R., 199; 1 Charley's Cases (Court), 183.

§ 1 Charley's Cases (Chambers), 130. See "Taxation of Costs" in the Schedule hereto, *infra*.

RULE V.

Rule V.,
Oct. 29, 1875.

The existing rules and practice, applicable to proceedings by persons suing in *formâ pauperis*, shall continue, and be applicable to proceedings to which this Order relates.

Pauper plaintiffs, who will swear that they are not worth £5 in the world, except their wearing apparel and the matter in question in the cause, are, by the Statutes 11 Hen. VII. c. 12, and 23 Hen. VIII. c. 15, exempted from the payment of Court Fees in actions at Common Law, are entitled to have Counsel and solicitor assigned to them by the Court without fee, and are excused from paying any costs when unsuccessful, but if successful may recover costs from the defendants.*

By Rule 8 of the VIIth Consolidated Order of the Court of Chancery, "No person shall be admitted to prosecute any suit in this Court *in formâ pauperis* without a certificate of Counsel that he conceives the case to be proper for relief in this Court."

By Rule 9 of the same Order, "After an admittance to sue or defend *in formâ pauperis*, no fee, profit, or reward shall be taken of the pauper by any Counsel or solicitor, for the despatch of the pauper's business during the time it shall depend in Court, and he shall continue *in formâ pauperis*; nor shall any agreement be made for any recompense or reward afterwards. And any person offending herein shall be deemed guilty of a contempt of Court; and the party admitted, who shall give any such fee or reward or make any such agreement, shall be thenceforth dispaupered, and not be afterwards admitted again in that suit to sue or defend *in formâ pauperis*."

By the 10th Rule of the same Order, "The Counsel or solicitor assigned by the Court† to assist a person admitted to sue *in formâ pauperis*, either to sue or defend, may not refuse so to do,‡ unless such Counsel or solicitor satisfy the Judge who granted the admittance with some good reason for his unwillingness to be so assigned.

By Rule 11 of the same Order, "No process of contempt shall be issued at the instance of any person suing or defending *in formâ pauperis*, until it be signed by his solicitor in the suit. And no notice of motion served or petition presented on behalf of any person admitted to sue or defend *in formâ pauperis* (except for the discharge of his solicitor) shall be of any effect, nor shall any person served with such notice or petition be bound to appear thereon, unless such notice or petition be signed by the solicitor of such person so suing or defending. And such solicitor shall take care that no such process be taken out and that no such notice or petition be served, needlessly or for vexation, but upon just and good grounds."

By Rule 5 of the XLth Consolidated Order of the Court of Chancery, "Where costs are ordered to be paid to a party suing or defending in

* 3 Steph. Comm., 576, 577, 7th Edn.

† See Rule 4 of Consolidated Order XII., and *Garrod v. Helden*, 4 Beav., 215.

‡ After Counsel and solicitor have been assigned, the pauper cannot be heard in person. *Parkinson v. Hanbury*, 4 D. M. G., 508.

Rule V., *formâ pauperis*, such costs shall be taxed as *dives* costs, unless the Court shall otherwise direct."*

Oct. 28, 1875.

A pauper may be allowed to appeal without paying the £20 deposit required by Consolidated Order XXXI., Rule 4.†

See also Consolidated Order II., Rule 10, and 23 and 24 Vict. c. 149, s. 2.

RULE VI.

Save as otherwise provided by this Order, all existing fees and percentages which may be taken in any of the Courts whose jurisdiction is, by the [Supreme Court of] Judicature Acts, 1873 and 1875, transferred to the High Court of Justice or Court of Appeal, or in any office which is connected with any of those Courts, or in which any business connected with any of those Courts, is conducted, or by any officer paid wholly or partly out of public moneys who is attached to any of those Courts, or the Supreme Court, or any Judge of those Courts, or any of them, shall be and are hereby abolished.

RULE VII.

A folio is to comprise seventy-two words, every figure comprised in a column being counted as one word.

This agrees with the Rules of the Supreme Court (Costs), Special Allowances and General Provisions, § 12, and also with Order XIX., Rule 6, *supra*.

RULE VIII.

The provisions of Order LXIII. in the First Schedule to the Supreme Court of Judicature Act, 1875, shall apply to this Order.

Order LXIII. is the Interpretation Clause.

RULE IX.

This Order shall come into operation at the time of the commencement of the Supreme Court of Judicature Acts, 1873 and 1875.

The time referred to is the 1st of November, 1875.

* For the cases upon these Rules, see the 5th Edn. of Morgan and Chute's Chancery Acts and Orders, p. 650 (copied from pp. 403-406 of the 4th Edn.).

† *Grimwood v. Shave*, 5 W. R., 482.

Form of Certificate for paying Lower Scale of Court Fees **Form, Oct. 23, 1875.**
above referred to.

(*Title of cause or matter.*)

I hereby certify that, to the best of my judgment and belief, the Lower Scale of Fees of Court is applicable to this case.

Dated, &c.

A.B.

Solicitor for Plaintiff or Defendant.

The SCHEDULE above referred to.*

An Order or Rule herein referred to by number shall mean the Order or Rule so numbered in the First Schedule to the Supreme Court of Judicature Act, 1875.

SUMMONSES, WRITS, COMMISSIONS, AND WARRANTS.

| | Lower Scale. | | | Higher Scale. | | |
|--|--------------|----|----|---------------|----|----|
| | £ | s. | d. | £ | s. | d. |
| On sealing a writ of summons for commencement of an action | 0 | 5 | 0 | 0 | 10 | 0 |
| On sealing a concurrent, renewed or amended writ of summons for commencement of an action .. | 0 | 2 | 6 | 0 | 2 | 6 |
| On sealing a notice for service† under Order XVI., Rule 18 | 0 | 2 | 6 | 0 | 2 | 6 |
| On sealing a writ of mandamus or injunction .. | 0 | 10 | 0 | 1 | 0 | 0 |
| On sealing a writ of subpoena not exceeding three persons | 0 | 2 | 6 | 0 | 5 | 0 |
| On sealing every other writ | 0 | 5 | 0 | 0 | 10 | 0 |
| On sealing a summons to originate proceedings in the Chancery Division | 0 | 5 | 0 | 0 | 10 | 0 |
| On sealing a duplicate thereof | 0 | 1 | 0 | 0 | 5 | 0 |
| On sealing a copy of same for service | 0 | 1 | 0 | 0 | 5 | 0 |
| On sealing or issuing any other summons or warrant | 0 | 2 | 0 | 0 | 3 | 0 |
| On sealing or issuing a commission to take oaths or affidavits in the Supreme Court | 5 | 0 | 0 | 5 | 0 | 0 |
| Every other commission | 1 | 0 | 0 | 1 | 0 | 0 |
| On marking a copy of a petition of right for service | 0 | 1 | 0 | 0 | 5 | 0 |

* Compare this Schedule with the Schedule annexed to Order VI. of the Rules of the Supreme Court (Costs), *supra*.
† On a person not a party to the action.

Schedule,
Oct. 20, 1875.

| | Lower Scale. | | | Higher Scale. | | |
|---|-----------------|----|----|------------------|----|----|
| | £ | s. | d. | £ | s. | d. |
| APPEARANCES. | | | | | | |
| On entering an appearance, for each person .. | 0 | 2 | 0 | 0 | 2 | 0 |
| COPIES. | | | | | | |
| For a copy of a written deposition of a witness to enable a party to print the same, for each folio. | 0 | 0 | 4 | 0 | 0 | 4 |
| For examining a written or printed copy, and marking same as an office copy, for each folio .. | 0 | 0 | 2 | 0 | 0 | 2 |
| For making a copy and marking same as an office copy, for each folio.. | 0 | 0 | 6 | 0 | 0 | 6 |
| For a copy in a foreign language, the actual cost. | | | | | | |
| For a copy of a plan, map, section, drawing, photograph, or diagram, the actual cost. | | | | | | |
| For a printed copy of an order, not being an office or certified copy, for each folio | 0 | 0 | 1 | 0 | 0 | 1 |
| ATTENDANCES. | | | | | | |
| On an application, with or without a subpoena, for any officer to attend as a witness, or to produce any record or document to be given in evidence (in addition to the reasonable expenses of the officer) for each day or part of a day he shall necessarily be absent from his office | 1 | 0 | 0 | 1 | 6 | 0 |
| The officer may require a deposit of stamps on account of any further fees, and a deposit of money on account of any further expenses which may probably become payable beyond the amount paid for fees and expenses on the application, and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof on the application. | | | | | | |
| The officer may also require an undertaking in writing to pay any further fees and expenses which may become payable beyond the amounts so paid and deposited. | | | | | | |
| OATHS, &c. | | | | | | |
| For taking an affidavit or an affirmation or attestation upon honour in lieu of an affidavit or a declaration, except for the purpose of receipt of dividends from the Paymaster-General, for each person making the same | 0 | 1 | 6 | 0 | 1 | 6 |

COURT FEES.

931

| | Lower Scale. | | | Higher Scale. | | | Schedule. Oct. 23, 1875. |
|--|-----------------|----|----|------------------|----|----|-----------------------------|
| | £ | s. | d. | £ | s. | d. | |
| And in addition thereto for each exhibit therein referred to and required to be marked, whether annexed or not | 0 | 1 | 0 | 0 | 1 | 0 | |
| FILING. | | | | | | | |
| On filing a special case or petition of right .. | 0 | 10 | 0 | 1 | 0 | 0 | |
| On filing an affidavit with exhibits (if any) annexed, submission to arbitration, award, bill of sale, warrant of attorney, cognovit, bail, satisfaction piece, and writ of execution with return .. | 0 | 2 | 0 | 0 | 2 | 0 | |
| On filing a scheme pursuant to the statute 30 & 31 Vict., c. 127, or the Liquidation Act, 1868 .. | 1 | 0 | 0 | 1 | 0 | 0 | |
| On filing a caveat | 0 | 5 | 0 | 0 | 5 | 0 | |
| CERTIFICATES. | | | | | | | |
| For a certificate of appearance, or of a pleading, affidavit, or proceeding having been entered, filed, or taken, or of the negative thereof .. | 0 | 1 | 0 | 0 | 4 | 0 | |
| SEARCHES AND INSPECTIONS. | | | | | | | |
| On an application to search for an appearance or an affidavit, and inspecting the same .. | 0 | 1 | 0 | 0 | 1 | 0 | |
| On an application to search an index, and inspect a pleading, decree, order or other record, unless otherwise expressly provided for by any Act of Parliament or this Order, and to inspect documents deposited for safe custody or production pursuant to an order, for each hour or part of an hour occupied | 0 | 2 | 6 | 0 | 2 | 6 | |
| Not exceeding on one day | 0 | 10 | 0 | 0 | 10 | 0 | |
| EXAMINATION OF WITNESSES. | | | | | | | |
| For every witness sworn and examined by an examiner or other officer in his office, including oath, for each hour | 0 | 10 | 0 | 0 | 10 | 0 | |
| For an examination of witnesses by any such officer away from the office (in addition to reasonable travelling and other expenses), per day .. | 3 | 0 | 0 | 3 | 0 | 0 | |
| The officer may require a deposit of stamps on account of fees and a deposit of money on account of expenses, which may probably become payable beyond any amount paid for fees and expenses upon the examination, and the officer or his | | | | | | | |

Schedule,
Oct. 23, 1878.

Lower
Scale.
£ s. d. l

clerk taking such deposit shall thereupon make a memorandum thereof and deliver the same to the party making the deposit.

The officer may also require an undertaking in writing to pay any further fees and expenses which may become payable beyond the amount so paid and deposited.

These fees are not to apply to the examination of witnesses for the purpose of any enquiry, taxation of costs, or other proceeding before the officer.

HEARING.

For entering or setting down, or re-entering or re-setting down an appeal to the Court of Appeal, or a cause for trial or hearing in any Court in London or Middlesex, or at any assizes, including a demurrer, special case, and petition of right, but not any other petition, nor a summons adjourned from chambers 1 0 0

For a certificate of an Associate of the result of trial 1 0 0

JUDGMENTS, DECREES, AND ORDERS.

For drawing up and entering a judgment, or a decree or decretal order, whether on the original hearing of a cause or on further consideration, including a cause commenced by summons at chambers, and an order on the hearing of a special case or petition, and any order by the Court of Appeal 0 10 0

For drawing up and entering any other order, whether made in Court or at chambers .. 0 3 0

For copy of a plan, map, section, drawing, photograph, or diagram, required to accompany any order, the actual cost.

TAKING ACCOUNTS.*

On taking an account of a receiver, guardian, consignee, bailee, manager, provisional, official, or voluntary liquidator, or sequestrator, or of an

* In the case of *Meredith v. Treffry*, 45 L. J. (Ch.), 162; 33 L. 24 W. R., 199; 1 Charley's Cases (Court), 183 (cited under Rule Order, *supra*), it was decided that the above percentage on the accounts is in substitution for the fee on the certificate of the account, chargeable under the old practice.

COURT FEES.

933

| | Lower Scale. £ s. d. | Higher Scale. £ s. d. | Schedule, Oct. 22, 1875. |
|--|----------------------------|-----------------------------|-----------------------------|
| executor, administrator, trustee, agent, solicitor, mortgagee, co-tenant, co-partner, execution creditor, or other person liable to account, when the amount found to have been received without deducting any payment shall not exceed £200.. | 0 2 0 | 0 2 0 | |
| Where such amount shall exceed £200 for every £50 or fraction of £50 | 0 0 6 | 0 0 6 | |
| In the case of any such receiver, guardian, consignee, bailee, manager, liquidator, sequestrator, or execution creditor, the fees shall, upon payment, be allowed in the account unless the Court or Judge shall otherwise direct, and in the case of taking the accounts of such other accounting parties the fees shall be paid by the party having the conduct of the order under which such account is taken, as part of his costs of the cause or matter (unless the Court or Judge shall otherwise direct), and in such case shall be taken upon the certificate of the result of any such account; but the fees shall be due and payable, although no certificate is required, on the account taken, or on such part thereof as may be taken, and the solicitor or party suing in person shall in such case cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the account. | | | |
| The officer taking the account may require a deposit of stamps on account of fees before taking the account, not exceeding the fees on the full amount appearing by the account to have been received, and the officer or his clerk taking such deposit shall make a memorandum thereon the account. | | | |

TAXATION OF COSTS.*

| | | |
|--|-------|-------|
| For taxing a bill of costs where the amount allowed does not exceed £8 | 0 2 0 | 0 4 0 |
|--|-------|-------|

* The taxing master's percentage on costs will be according to the above scale, in all cases in which the costs have not been taxed before the 1st of November, 1875. Per Quain, J., after consultation with the Masters, 1 Charley's Cases (Chambers), 130.

**Schedule,
Oct. 22, 1873.**

| | Lower Scale. | | | High Scale. | |
|--|-----------------|----|----|----------------|----|
| | £ | s. | d. | £ | s. |
| Where the amount exceeds £8, for every £2 allowed, or a fraction thereof | 0 | 0 | 6 | 0 | 1 |

These fees, except where otherwise provided, shall be taken on signing the certificate or on the allowance of the bill of costs, as taxed, but the fees shall be due and payable if no certificate or *allocatur* is required on the amount of the bill as taxed, or on the amount of such part thereof as may be taxed, and the solicitor or party suing in person shall in such case cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the bill of costs.

The taxing officer may require a deposit of stamps on account of fees before taxation not exceeding the fees on the full amount of the costs as submitted for taxation, and the officer or his clerk on taking such deposit shall make a memorandum thereof on the bill of costs.

For a certificate or *allocatur* of the result, not being a judgment 0 0 0 1

The 58th Rule of Order V. of the Chancery Funds Consolidated Rules, 1874,* shall continue in force and be acted upon in cases to which it is applicable.

PETITIONS.

| | | | | |
|--|---|----|---|---|
| For answering a petition for hearing in Court, and setting down.. .. . | 0 | 5 | 0 | 1 |
| For answering a non-attendable petition, not being a petition for an order of course | 0 | 5 | 0 | 0 |
| On a matter of course order, on a petition of right | 0 | 10 | 0 | 0 |
| On an order for a commission on a petition of right | 1 | 0 | 0 | 1 |

* "When costs are directed to be paid out of money in Court, or the proceeds of securities in Court, the taxing master shall certify amount of the fees of taxation payable in respect of such costs, and shall certify that such fees are included in the costs as taxed. Chancery Paymaster shall carry over the amount so certified payable from the account to which money or proceeds are paid on a separate account in the books at the Chancery Pay Office for taxation; and the amount so carried over shall from time to time, Treasury may direct, be paid to the account of Her Majesty's Exchequer."

COURT FEES.

935

Lower
Scale.
£ s. d.Higher
Scale.
£ s. d.Schedule,
Oct. 28, 1875.

REGISTER OF JUDGMENTS AND LIS PENDENS.

| | | | | | | |
|--|---|---|---|---|---|---|
| For registering a judgment or <i>lis pendens</i> , although more than one name may have to be registered.. .. | 0 | 2 | 6 | 0 | 2 | 6 |
| For re-registering same | 0 | 1 | 0 | 0 | 1 | 0 |
| For a search for each name | 0 | 1 | 0 | 0 | 1 | 0 |
| For a certificate of entry of satisfaction .. | 0 | 1 | 0 | 0 | 1 | 0 |
| For certificate of a judgment for registration in Ireland or Scotland under the Judgments Ex- tension Act, 1868, including affidavit .. | 0 | 2 | 0 | 0 | 2 | 0 |
| On filing for registration a certificate issued out of Courts of Dublin or Court of Session in Scot- land under the same Act, although more than one name may have to be registered under the same Act | 0 | 7 | 0 | 0 | 7 | 0 |
| On every certificate of the entry of a satisfaction under the same Act | 0 | 1 | 0 | 0 | 1 | 0 |
| For a search made in one or both of the registers of Irish and Scotch judgments, for each name .. | 0 | 1 | 0 | 0 | 1 | 0 |

MISCELLANEOUS.

| | | | | | | |
|---|---|----|---|---|----|---|
| On a report of a private Bill in Parliament .. | 5 | 0 | 0 | 5 | 0 | 0 |
| On an allowance of bye-laws or table of fees .. | 1 | 0 | 0 | 1 | 0 | 0 |
| On a <i>fiat</i> of a Judge | 0 | 5 | 0 | 0 | 5 | 0 |
| On signing an advertisement | 0 | 0 | 0 | 1 | 0 | 0 |
| Upon a reference to a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions, or a District Registrar, for the purpose of any investi- gation or inquiry, other than the taking of an account, for which another fee is herein provided, for every hour or part of an hour the Master or Registrar is occupied | 0 | 10 | 0 | 0 | 10 | 0 |
| A deposit on account of fees before proceeding with such reference, or at any time during the course thereof, may be required, and a memorandum thereof shall be delivered to the party making the deposit. | | | | | | |
| On taking acknowledgment of a deed by a married woman | 1 | 0 | 0 | 1 | 0 | 0 |
| On taking a recognizance or bond | 0 | 10 | 0 | 0 | 10 | 0 |
| On taking bail, and taking same off the file and delivering.. .. | 0 | 2 | 0 | 0 | 2 | 0 |

Schedule,
Oct. 28, 1875.

| | Lower Scale. | | | Higher Scale. | | |
|--|-----------------|----|----|------------------|----|----|
| | £ | s. | d. | £ | s. | d. |
| On a commitment | 0 | 5 | 0 | 0 | 5 | 0 |
| On an application to produce Judge's notes .. | 0 | 5 | 0 | 0 | 5 | 0 |
| On appointment of Commissioners under glebe exchange | 1 | 0 | 0 | 1 | 0 | 0 |
| On examining and signing enrolments of decrees and orders | 3 | 0 | 0 | 3 | 0 | 0 |
| On admission or re-admission of a solicitor .. | 5 | 0 | 0 | 5 | 0 | 0 |
| On a written request for information at the Chancery Pay Office | 0 | 2 | 6 | 0 | 2 | 6 |
| For preparing a power of attorney at the Chancery Pay Office.. .. . | 0 | 3 | 0 | 0 | 3 | 0 |
| For transcript of an account in the books at the Chancery Pay Office, for each opening .. | 0 | 2 | 0 | 0 | 2 | 0 |

CAIRNS, C.
G. JESSEL.
COLERIDGE.
FITZROY KELLY.
W. M. JAMES.
GEORGE MELLISH.
G. BRAMWELL.
NATHANL. LINDLEY.

We certify that this Order is made with the concurrence
of the Commissioners of Her Majesty's Treasury.

MAHON.
ROW. WINN.

STAMPS.

ORDER

OF THE 28TH OF OCTOBER, 1875.*

AS TO THE TAKING OF THE FEES AND PERCENTAGES BY STAMPS, EXCEPT IN THE DISTRICT REGISTRIES.

WHEREAS by section 26 of the Supreme Court of ^{2nd Order} Oct. 28, 1875. Judicature Act, 1875, it is provided that the fees and percentages appointed to be taken in the High Court of Justice and in the Court of Appeal, and in any Court to be created by any commission, and in any office which is connected with any of those Courts or in which any business connected with any of those Courts is conducted, shall, except so far as they be otherwise directed, be taken by means of stamps; and further, that such stamps shall be impressed or adhesive, as the Treasury may from time to time direct; and that the Treasury, with the concurrence of the Lord Chancellor, may, from time to time, make such Rules as may seem fit for publishing the amount of the fees and regulating the use of such stamps, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for ensuring the proper cancellation of such stamps.

Now we, the undersigned, being two of the Lords Commissioners of Her Majesty's Treasury, do, with the con-

* This Order should be read in connection with the Order of the 22nd of April, 1876, *infra*, as to the Fees and Percentages to be taken by Stamps, and the Order of the 28th of October, 1875, *supra*, as to Court Fees.

2nd Order,
Oct. 28, 1875.

currence of the Lord Chancellor, hereby give notice and order and direct—

The Commissioners of Inland Revenue (W. N., 1875, p. 44) issued a notice on the 26th of October, 1875 (*i.e.*, two days before the issuing of the present Order by the Treasury), that "Stamps applicable to the Scale of Fees under the Judicature Acts ~~MAY BE OBTAINED AT SOMERSET HOUSE, ROOM NO. 3,~~" and, further, that "Stamps heretofore appropriated to the Courts of Chancery and Common Law, respectively, may continue to be used in those Divisions of the Supreme Court of Judicature [*? High Court of Justice*], so far as they are applicable to the new Scale of Fees."

RULE I.

That from and after the 1st November next,* being the date fixed for the commencement of this Act,† all orders and regulations now in force with respect to the use, proper cancellation, mode of keeping accounts, and allowance of fee stamps in

The Court of Chancery,

The several Common Law Courts,

The Court of Probate,

The Court for Divorce and Matrimonial Causes,

The Admiralty Court,

or in relation to appeals from the Chief Judge in Bankruptcy or from the Court of Appeal in Chancery in Bankruptcy matters, shall continue in force up to the beginning of the sittings to take place after January next,‡ or until they shall respectively be altered or annulled by any Rules hereafter to be made and published in conformity with the Act.§

As to the Chancery Regulations, see the Chancery Suitors' Relief Act, 1852 (15 & 16 Vict. c. 87); Order XXXIX. of the Consolidated Orders of the Court of Chancery; and the Regulations as to Fees, 1860.

As to the Common Law Regulations, see the Common Law Courts (Fees) Act, 1865 (28 Vict. c. 45); the General Rules relating to the Col-

* 1875. † *Sic.* The reference is to s. 2 of the Supreme Court of Judicature Act, 1875.

‡ The 26th April, 1876. See the recital to the Order of the 22nd April, 1876, as to Stamps.

§ See the Order of April 22nd, 1876, *infra*, as to the Fees and Percentages to be taken by Stamps.

lection of Fees by Stamps made under s. 3 of that Act;* the Regulations of the 30th December, 1865, as to Stamps on the transaction of business at Judges' chambers†; the Regulations as to the payment of Fees by Stamps on the Circuits, of the 13th of Feb., 1866;‡ the Regulations as to the Mode of Cancelling Stamps, of the 26th of Feb., 1866.§

Rule I., Oct.
28, 1875.

As to the Court of Probate Regulations, see The Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 97, 98, and 99; c. 15 of Coote's Probate Practice; and the Order as to the mode of carrying in Fee Stamps, of the 8th December, 1865.||

As to the Regulations in the Court for Divorce and Matrimonial Causes, see the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 60 and 61.

As to the Regulations in the Court of Admiralty, see the Admiralty Court Act, 1854 (17 & 18 Vict. c. 78), ss. 14, 15, 16, 17, 18, 19, 20, and 21.

See now the Regulations contained in the Order of the 22nd of April, 1876, as to Stamps, *infra*. The "Cancellation" is by that Order¶ to be effected "in such manner as the Commissioners of Inland Revenue shall from time to time direct."

RULE II.

*That the stamps to be used in the collection of fees and percentages payable under the Order made in pursuance of the powers given by the Supreme Court of Judicature Act, 1875, bearing date this day,** shall until further notice be either impressed or adhesive as directed in any previous Order; and in cases to which no previous Order is applicable, shall be either impressed or adhesive, at the option of the parties by whom the fees are payable.*

The requisite "further notice" was given by the Order of the 22nd of April, 1876, which see, *infra*.

The Schedule to that Order supersedes the present Rule, containing, as it does, in the third column, minute provisions as to "the character of the Stamps to be used."

RULE III.

That until we do order to the contrary, the dies heretofore in use for impressing stamps in any of the Courts affected by the said Act, and also the adhesive stamps heretofore in use, shall be available and valid for the taking of the said fees and percentages, and may be used notwithstanding that new dies and stamps appropriated to the

* See them in the Appendix to Day's Common Law Procedure Acts, p. 609 (4th edn., 1872).

† *Ibid.*, p. 612.

‡ *Ibid.*, p. 613.

§ *Ibid.*, p. 615.

|| Coote's Probate Practice, 279.

¶ "General Directions," *sub finem*.

** See the Order as to Court Fees, of the 28th of October, 1875, *supra*.

Rule III., Oct. 28, 1875. Supreme Court of Judicature may in the meantime have been issued by the Commissioners of Inland Revenue, which will also be valid and available.

"The adhesive stamps heretofore in use." See the next Rule of this Order, and the note thereto, and also Rule 2 of the Order of the 22nd of April, 1876, as to Stamps, *infra*.

RULE IV.

That for such documents in the Chancery, the Queen's Bench, the Common Pleas, and the Exchequer Divisions of the Supreme Court of Judicature as may be, under any existing Rule or Order, stamped with an adhesive stamp or stamps, adhesive stamps appropriated by the words "Judicature Fees" shall be used; Provided always, that up to the beginning of the sittings to take place after January next,* the adhesive stamps hitherto used in the Courts of Chancery and Common Law shall be available and may be used for such documents in the Supreme Court of Judicature.

The proviso to this Rule is recited by the Order of the 22nd of April, 1876, as to Court Fees, and is further *extended* by Rule 2 of that Order, as follows:—"The adhesive stamps at present in use in the Supreme Court of Judicature *shall continue to be used so long as they are supplied* by the Commissioners of Inland Revenue."

RULE V.

And that where any of such fees are payable in respect of any matter or thing to be done by any officer or in any office whatever of the Supreme Court of Judicature, and it shall not have been customary or may not be necessary to use any written or printed document or paper in reference to such matter or thing whereon the stamp could be stamped or affixed, the party or his solicitor requiring such matter or thing to be done, shall make application for the same by a *præcipe*, or short note in writing or print, and a

* The 25th of April, 1876. See the Recital to the Order of the 22nd of April, 1876, as to Stamps.

denoting the amount of the fees so payable shall be ^{Rule V., Oct. 28, 1878.}
 ed or affixed to such *præcipe* or note.
 as Schedule to the Order of the 22nd of April, 1876, *infra*.

RULE VI.

*where a fee is payable, but no directions are found in previous
 as to the document to which the stamp is to be applied, it shall
 l, until we do otherwise order,* for any officer of the Supreme Court
 ity it would be to see that the fee in question is duly paid by means
 mp, to decide on what document such stamp shall be impressed or*

Given under our hands,

MAHON,

Row. WINN.

reby signify my concurrence in the before-mentioned
 and Regulations

CAIRNS, C.

as Schedule to the Order of the 22nd of April, as to Stamps, super-
 is Rule, as in the second column it specifies, with particularity,
 document to be stamped."

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

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mentioned, being, except as to mere forms, the regulations hereinafter set forth (that is to say) :

**Rules,
Nov. 2nd,
1875.**

“As regards sections 15, 16, 17 and 18 of the Act of the 6th and 7th years of the reign of Her present Majesty, cap. 73, and section 11 of the Act of the 23rd and 24th years of the reign of Her present Majesty, cap. 127 : It shall be lawful for the Master of the Rolls, jointly with the Judges of the Queen's Bench Division, Common Pleas Division, and Exchequer Division of the High Court of Justice, or with any eight or more of them (of whom the Presidents of the said Divisions shall be three), if they shall see fit so to do, to nominate and appoint Examiners, and to make Rules and Regulations for conducting the examination of persons applying to be admitted as Solicitors of the Supreme Court, as well touching the articles and service as the fitness and capacity of such persons to act as Solicitors of the Supreme Court, including their fitness and capacity to act in matters of business usually transacted by Solicitors. And if the Master of the Rolls, or any of the Judges of the said three Divisions shall, by such examination, or by the certificate of such Examiners, be satisfied that such persons are duly qualified to be admitted to act as Solicitors of the Supreme Court, then, and not otherwise, the Master of the Rolls shall and may administer the requisite oath, and cause such persons to be admitted Solicitors of the Supreme Court, and their names to be enrolled as Solicitors of such Court, which admission shall be written on parchment and signed by the Master of the Rolls.”

“With regard to section 20 of the said Act of the 6th and 7th years of the reign of Her present Majesty, cap. 73 : Such person or persons as the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer shall for that purpose jointly appoint, shall have the custody and care of the rolls or books wherein persons are enrolled as Solicitors of the Supreme Court, and shall be deemed and taken as the proper officer or officers for filing such affidavits as in the said Act mentioned ; and he or they is or are hereby also respectively required, from time to time, without fee or reward other than as in the said Act mentioned, to enrol the name of every person who shall be admitted a Solicitor of the Supreme Court pursuant to the directions in the said Act, and the time when admitted, in alphabetical order, in rolls or books to be kept for that purpose, to which rolls or books all persons shall and may have free access without fee or reward.”

“And as regards section 8 of the said Act of the 23rd and 24th years of the reign of Her present Majesty, cap. 127, the Presidents of the Queen's Bench Division, Common Pleas Division, and Exchequer Division of the High Court of Justice, jointly with the Master of the Rolls, may from time to time make Regulations for the examination in such branches of general knowledge as they may deem proper of all persons (not having taken degrees or successfully passed such University examinations as in the said Act mentioned) hereafter becoming bound under articles of clerkship to Solicitors. And the said Judges by such Regulations may require such examination to be passed either before persons so become bound, or at any time before their admission as Solicitors, as to the said Judges may seem fit, and the said Judges may from time to time revoke or alter any such Regulations as they think fit, and may from time to time appoint Examiners for conducting such examination as aforesaid. And the said Judges,

**Rules,
Nov. 2nd,
1875.**

or any one or more of them, may, where, under special circumstances, they or he see fit so to do, dispense with compliance with such regulations entirely or partially, or subject to such conditions as to them or him may seem fit."

"And as regards section 9 of the last mentioned Act, the Presidents of the Queen's Bench Division, Common Pleas Division, and Exchequer Division of the High Court of Justice, jointly with the Master of the Rolls, may from time to time, if they see fit, make regulations for the examination of persons now bound, or hereafter becoming bound, under articles of clerkship as aforesaid, at such time or period of their service as the said Judges may think fit and direct, in order to ascertain the progress made by such persons in acquiring the knowledge necessary for rendering them fit and capable to act as Solicitors, and such examination shall be conducted by the Examiners appointed under the Act of the 6th and 7th years of the reign of Her present Majesty, cap. 73, or such other Examiners as the said Judges may from time to time appoint in this behalf, and the said Judges may, by regulations in the case of persons who fail to pass such examinations to the satisfaction of the Examiners, postpone, either for a definite time or such time as the said Examiners may in each case think proper, and either conditionally or otherwise, the examination required to be passed at the expiration of the term of service under articles and before admission."

"And as regards section 23 of the same Act, if any Solicitor of the Supreme Court, after having at any time taken out a stamped certificate, shall, for the space of a whole year from and after the expiration thereof, have neglected to renew the same for the following year, the Registrar shall not afterwards grant a certificate to such Solicitor, except under an order of the Master of the Rolls, and it shall be lawful for the Master of the Rolls to direct the Registrar to issue a certificate to such person upon such terms and conditions as he shall think fit."

"And as regards every other enactment relating to Attorneys, and every declaration, certificate, or form required by or with reference to such enactment, the same respectively shall be read as if the words 'Solicitor of the Supreme Court' were inserted in such enactment, declaration, certificate, or form, in lieu of the word Attorney."

Now we, The Right Honourable Sir Alexander James Edmund Cockburn, Baronet, Lord Chief Justice of England, The Right Honourable Sir George Jessel, Master of the Rolls, The Right Honourable John Duke Baron Coleridge, Lord Chief Justice of the Common Pleas, and The Right Honourable Sir Fitzroy Kelly, Lord Chief Baron of the Exchequer, as to those of the several Orders intended to be hereby made which do not require the concurrence of the Judges of the Queen's Bench Division, Common Pleas Division, and Exchequer Division of the High Court of Justice, or any five or more of them; And we, the said Sir Alexander James Edmund Cockburn, Sir George Jessel, John Duke Baron Coleridge, and Sir Fitzroy Kelly, and The Honourable Sir Robert Lush, one of the Judges of the Queen's Bench Division of the High Court of Justice, The Honourable Sir George Denman, one of the Judges of the Common Pleas Division, The Honourable Sir Richard Paul Amphlett, one of the Judges of the Common Pleas Division, The Honourable Sir Nathaniel Lindley, one of the Judges of the Common Pleas Division, and The Honourable Sir John Richard Quain, one of the Judges of the Queen's Bench Division, as to those of the several Orders intended to be hereby made which require the concurrence of the Judges of the Queen's Bench Division, Common

Pleas Division, and Exchequer Division of the High Court of Justice, or any five or more of them, Do hereby, in pursuance of the powers contained in the hereinbefore mentioned enactments relating to Attorneys and Solicitors, and so adapted as aforesaid, order as follows:—

Rules.
Nov. 2nd,
1875.

As to the Preliminary and Intermediate Examinations of persons intending to become Solicitors of the Supreme Court.

Every person so intending to become a Solicitor shall, before being bound under articles of clerkship to a Solicitor, pass a preliminary examination in general knowledge, and shall, after becoming bound under articles and during his service under such articles, pass an intermediate examination, to ascertain the progress made by him in acquiring the knowledge necessary for rendering him fit and capable to act as a Solicitor of the Supreme Court.

Every such preliminary examination shall be conducted by Special Examiners, to be from time to time appointed by the Presidents of the Queen's Bench Division, Common Pleas Division, and Exchequer Division of the High Court of Justice (who are hereafter called "the said Chiefs"), jointly with the Master of the Rolls, and shall be so conducted, subject to the Regulations contained in the First Schedule hereto, or under such other Regulations as shall be submitted to and approved by the said Chiefs and the Master of the Rolls. And every such intermediate examination shall be so conducted by the persons for the time being appointed Examiners for conducting the final examination required to be passed by persons intending to become Solicitors, and shall be conducted at the place appointed for holding such final examination, and subject to the Regulations contained in the Second Schedule hereto or under such other Regulations as shall be submitted to and approved by the said Chiefs and the Master of the Rolls.

The Order hereby made as to preliminary examination is made subject and without prejudice to the power given to the said Chiefs and the Master of the Rolls, or any one or more of them, by section 8 of the Act of Parliament of the 23rd and 24th years of the reign of Her present Majesty, cap. 127, of dispensing under special circumstances with the Regulations as to such preliminary examination. And the Order hereby made as to preliminary examination shall not apply to any person having taken the degree of Bachelor of Arts or Bachelor of Laws in the Universities of Oxford, Cambridge, Dublin, Durham, or London, or in the Queen's University in Ireland, or the degree of Bachelor of Arts, Master of Arts, Bachelor of Laws, or Doctor of Laws in any of the Universities of Scotland, none of such degrees being honorary degrees, or who shall have been called to the degree of Utter Barrister in England, or who shall have passed the first public examination before Moderators at Oxford, or the previous examination at Cambridge, or the examination in arts for the second year at Durham, or who shall have passed one of the local examinations established by the University of Oxford, or one of non-gremial examinations established by the University of Cambridge, or one of the examinations of the new Oxford and Cambridge School Examination Board, or one of the matriculation examinations at the Universities at Dublin or London (notwithstanding he may not have been placed in the first division of such matriculation examination), or the examination for the first-class certificate of the College of Preceptors incorporated by Royal Charter in 1849.

And every person who shall be exempt from such preliminary examination by reason of his having passed the first public examination before

Rules,
Nov. 2nd,
1875.

Moderators at Oxford, or the previous examination at Cambridge, or the examination in arts for the second year at Durham, or the matriculation examination at the Universities of Dublin or London, being placed in the first division of such matriculation examination, shall be entitled to the benefit of the 5th section of the last-mentioned Act of Parliament (23 & 24 Vict. c. 127).

Any person claiming to be exempt from the preliminary examination, or claiming the benefit of the said 5th section, shall, before he shall be entitled to such exemption or benefit, produce to the Registrar of Solicitors a *testamur*, certificate, or other satisfactory evidence, showing his right to such exemption or benefit.

The following persons are hereby appointed Special Examiners for conducting the preliminary examination until the 31st day of December, 1876 (namely):—Christopher Knight-Watson, Marian Gunther William Fischer, Girolamo Volpe, Victoriano Carrias.

As to the Final Examination before Admission of persons intending to become Solicitors of the Supreme Court, and as to their Admission.

Every person before he shall be entitled to be admitted shall comply with the several Regulations contained in the third Schedule hereto, and the final examination previous to admission shall be conducted by the Examiners under the Regulations in that behalf contained in the same third Schedule, or under such other Regulations as shall be submitted to and approved by the said Chiefs and the Master of the Rolls.

Until the offices of Masters of the Queen's Bench Division, Common Pleas Division, and Exchequer Division of the High Court of Justice shall be abolished, the several Masters for the time being of those Divisions shall be *ex-officio* Examiners; and the other Examiners for conducting the final examination shall be twenty solicitors of the Supreme Court, to be nominated or appointed by the Master of the Rolls, jointly with the Judges of the Queen's Bench Division, Common Pleas Division, and Exchequer Division of the High Court of Justice, or with any eight or more of them, of whom the Presidents or Chiefs of such Divisions shall be three.

Any six of the Examiners, one of whom shall be an *ex-officio* Examiner, shall be competent to conduct the examination.

The following persons (namely):—Francis Thomas Bircham, Richard Boyer, Ebenezer John Bristow, Barnard Platts Broomhead, William Strickland Cookson, Robert Richardson Dees, Charles John Follett, William Ford, Clement Francis, Frederick Halsey Janson, William Alfred Jevons, Grinham Keen, Benjamin Greene Lake, Charles William Lawrence, Henry Markby, Park Nelson, Henry Watson Parker, William Benjamin Paterson, Henry Leigh Pemberton, Cornelius Thomas Saunders, shall be the first Examiners (other than the *ex-officio* Examiners) for conducting the final examination, and shall hold their office until the 31st day of December, 1876.

The Examiners (other than *ex-officio* Examiners, and other than the Examiners hereinbefore appointed) shall hold their office by virtue of such appointment for one year only, but they, or any of them, shall be eligible for re-appointment, and the Examiners (other than the *ex-officio* Examiners) shall be nominated and appointed annually.

In case the offices of Masters of the said Divisions of the High Court of Justice shall be abolished, or no one of the Masters shall be able to act as an *ex-officio* Examiner, the Master of the Rolls, jointly with the Judges of the said Divisions, or any eight or more of them, of whom the said Chiefs

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shall be three, may from time to time nominate some duly qualified officer of the Court to act as an *ex-officio* Examiner for one year, or any less period, and such officer shall not, by reason of his having acted as an *ex-officio* Examiner, be ineligible for re-appointment as such.

Subject to appeal, as hereinafter mentioned, no person shall be admitted to be sworn a Solicitor of the Supreme Court, except on production of a certificate, signed by the major part of the Examiners actually present at and conducting his examination, testifying his fitness and capacity to act as a Solicitor of the Supreme Court, and in the usual business transacted by a Solicitor; and such certificate shall be in force for the period of six months next after the date thereof, and no longer, unless such period shall be specially extended by the order of the Master of the Rolls.

Any person who shall have been refused such certificate, and who shall object to such refusal, whether on account of the nature or difficulty of the questions put to him by the Examiners or on any other ground whatsoever, shall be at liberty, within one month next after such refusal, to apply for admission, by petition in writing, to the Master of the Rolls. Such petition shall be presented at the Petty Bag Office without the payment of any fee, and a copy of such petition shall be left therewith, and shall be delivered by the Clerk of the Petty Bag to the Secretary of the Incorporated Law Society of the United Kingdom, and the Clerk of the Petty Bag shall also notify to such Secretary the day appointed for the hearing of the petition. Such petition shall be heard by the Master of the Rolls on such day after the end of fourteen days from the day on which such petition shall be presented, and at such time as he shall appoint; and the Master of the Rolls shall, upon hearing such petition, make such order as to him shall seem meet. The Clerk of the Petty Bag shall, on receiving such petition, notify the same to the Registrar of Solicitors.

The intermediate and final examinations shall be held in the hall or building of the Incorporated Law Society of the United Kingdom (the said society having allowed the same to be used for that purpose), on such days in January, April, June and November, as the said Examiners, or any six of them, shall appoint; and any person (not previously admitted an Attorney or a Solicitor of the Court of Chancery, or of the Supreme Court, who shall be desirous of being admitted a Solicitor of the Supreme Court, shall give notice in writing, signed by himself or his agent, six weeks at the least before the first day of the month in which he shall propose to be examined, of his intention to apply for examination, by leaving such notice with the Secretary of the said Society at their said hall, which notice shall also state his place or places of residence and service for the last preceding twelve months.

As to Re-admission, and the taking out and renewal of Certificates.

On an application to re-admit a Solicitor of the Supreme Court who has been struck off the roll, or on an application to take out or renew the annual certificate of a solicitor, the applicant shall, six weeks before the application is intended to be made, give notice thereof as in the case of an original admission, and the affidavits in support of such application shall be filed at the Petty Bag Office, and a copy thereof shall at the same time be left with the Clerk of the Petty Bag, to be delivered by him to the Registrar of Solicitors, and the order for such re-admission, taking out or renewal, shall (if made) be drawn up (as the Master of the Rolls shall direct) on reading such affidavits, and an affidavit of such copies having been left and notices given in compliance with this Order.

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Upon an application to dispense with the required notice of intention to take out or renew a certificate, a summons shall be served on the Registrar of Solicitors calling on him to show cause within ten days why such taking out or renewal of certificate should not be allowed ; and if no cause be shown to the satisfaction of the Master of the Rolls, he may, if he shall think proper, make an order for allowing such certificate to be issued.

Any application for re-admission shall be by petition to the Master of the Rolls, to be presented at the Petty Bag Office without the payment of any fee, and a copy of such petition shall be served on the Registrar of Solicitors not less than fourteen days before the same shall be heard. On hearing such petition the Master of the Rolls may dispose of the same, or, if he shall think fit, may refer the same to any other Division of the High Court of Justice.

All applications to dispense with any rule or rules as to any re-admission or taking out or renewal of certificates, shall be made to the Master of the Rolls in such manner as he shall from time to time direct.

All Orders made by the High Court of Justice or the Court of Appeal, or any Division or Judge thereof, for striking any Solicitor off the roll, or for suspending any Solicitor from practice, or for re-admitting any Solicitor or restoring the name of any Solicitor to the roll, or for altering the name of any Solicitor on the roll, or for any other purpose involving any alteration in or addition to the Roll of Solicitors of the Supreme Court, shall be filed with the Clerk of the Petty Bag, who shall thereupon make such entry on or alteration in the said roll as may be directed by such Order, and inform the Registrar of Solicitors thereof.

As to Custody of Rolls and Documents.

The Clerk of the Petty Bag shall have the custody and care of the rolls or books wherein persons are and shall be enrolled as Solicitors of the Supreme Court, and shall be the proper officer for filing all affidavits, and enrolling and registering all contracts or articles, and assignments of articles, relating to the admission of Solicitors of the Supreme Court, and shall have and retain the custody of all books, affidavits and documents relating to Attorneys or Solicitors, which now are or should be in the custody of the Masters of the late several Courts of Law at Westminster, or which now are or should be in his own custody as Clerk of the Petty Bag.

Provisions as to Notices, &c., already given.

The Orders hereby made as to preliminary examination shall not apply to persons who, under the Orders for the time being in force, shall have passed a preliminary examination, or been articulated after due exemption from such preliminary examination, prior to the date of the Orders hereby made ; but such preliminary examination or exemption shall be deemed to have been a preliminary examination or exemption in pursuance of or subsequently to the Orders hereby made.

And the Orders hereby made as to intermediate examination shall not apply to persons who, under the Orders for the time being in force, shall have passed an intermediate examination prior to the date of the Orders hereby made ; but such intermediate examination shall be deemed to have been an intermediate examination in pursuance of these Orders.

And the Orders hereby made as to final examination before admission shall not apply to persons who, under the Orders for the time being in force, shall have passed a final examination prior to the date of the Orders hereby made ; but such final examination shall be deemed to have been a final examination in pursuance of these Orders.

And as regards all persons now under articles, and who have not yet passed the intermediate or final examinations, all notices given, and examinations to be made, in pursuance of such notices, and the subjects notified as the subjects for examination, shall respectively be deemed to be notices, examinations, and subjects given, made, and notified respectively, under and in pursuance of the Orders hereby made; but subject thereto the examination and admission of all such persons shall be made in accordance with the Orders hereby made.

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And as regards the preliminary examination to be held in the month of February, 1876, all notices given and examinations to be made in pursuance of such notices, and the subjects notified as the subjects for examination, shall respectively be deemed to be notices, examinations, and subjects given, made, and notified respectively under and in pursuance of the Orders hereby made, notwithstanding such notified subjects may not comprise all of the subjects specified in the First Schedule hereto.

THE FIRST SCHEDULE.

The preliminary examinations shall take place at four periods in each year (that is to say), in the months of February, May, July, and October, on such days as the Special Examiners shall from time to time appoint; and they shall be conducted either by the Special Examiners personally, in the Hall of the Incorporated Law Society of the United Kingdom, in Chancery Lane, London, or by and under the supervision of the two local Solicitors to be appointed by the Special Examiners, as hereinafter mentioned, in the following towns, or some of them (namely):—Birmingham, Brighton, Bristol, Cambridge, Cardiff, Carlisle, Carmarthen, Chester, Durham, Exeter, Lancaster, Leeds, Lincoln, Liverpool, Maidstone, Manchester, Newcastle-on-Tyne, Oxford, Plymouth, Salisbury, Shrewsbury, Swansea, Worcester, York.

The preliminary examination shall be on the following subjects (namely):

1. Reading aloud a passage from some English author.
2. Writing from dictation.
3. Writing a short English composition.
4. Arithmetic: the first four rules, simple and compound; the rule of three; and decimal and vulgar fractions.
5. Geography of Europe and of the British Isles, and History of England.
6. Latin—elementary.
7. And in two languages to be selected by the candidate out of the following six (namely): (1) Latin; (2) Greek—Ancient; (3) French; (4) German; (5) Spanish; (6) Italian.

With respect to the examination of candidates residing in and desiring to be examined in the country, papers shall be transmitted by the Special Examiners to some local Solicitors to be appointed by them for that purpose, in some of the hereinbefore mentioned towns in England and Wales, who shall call the candidates before them at convenient times, to be fixed by the Special Examiners, and require them to read aloud before them as in subject 1 before mentioned, and to give written answers in the several other subjects before mentioned, in the presence of the persons so appointed, who shall then seal up and send to the Special Examiners the answers so written, and a report as to the reading aloud.

Every person applying to be examined shall give one calendar month's notice, in writing, to the Registrar of Solicitors of his desire to be

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examined in the subjects specified in this Schedule, and shall state in such notice the two languages in which he proposes to be examined, under the subject of examination herein-mentioned, numbered 7, and the place at which he wishes to be examined, and his age and place or mode of education.

The said Examiners shall conduct the examination of every such applicant in the manner and to the extent hereby directed and in no other manner, and to no further extent, and at least five calendar months previous to the time appointed for taking such examination the Special Examiners shall leave with the Registrar of Solicitors a list of the books selected by them for examination in the subjects above mentioned, numbered 7, and a copy of such list may immediately thereupon be obtained from the registrar upon application.

Each person on receiving his certificate shall pay the fee of £2 to the Council of the Incorporated Law Society of the United Kingdom towards the expenses of such examination.

If the Special Examiners conducting such examination shall be satisfied with the proficiency shown by the candidate, they shall sign a certificate to the following effect:—

We respectively certify that A.B. has been examined by us [or “under our direction” in case the examination should be conducted in the country] as required by the Order of the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, dated the day of 187 [mentioning the date of this Order], in the several subjects of general knowledge mentioned in the 1st Schedule to the said Order. And we respectively certify that he has passed a satisfactory examination.

Dated this day of 187 .

The last mentioned certificate (in the case of a person not claiming exemption from the preliminary examination) shall be produced to the Registrar of Solicitors by the person entering into articles of clerkship before or at the time of producing his articles of clerkships to the said registrar in pursuance of the 7th section of the Act of the 23rd and 24th years of the reign of Her present Majesty, chapter 127.

And any person claiming exemption from the preliminary examination, or claiming the benefit of the 5th section of the said Act, shall produce to the Registrar of Solicitors the *testamur*, certificate, or other evidence showing his right to such exemption before or at the time of producing his articles of clerkship aforesaid.

In conducting the preliminary examination, the principle on which marks shall be given for the answers to the questions shall be in the discretion of the Examiners, who shall have power, if they think fit (but they shall not be obliged to adopt the principle), of giving minus or negative marks for incorrect or careless answers.

THE SECOND SCHEDULE.

Every person serving under articles of clerkship shall be examined within the six calendar months next succeeding the day on which he shall have completed half his term of service, in such elementary works on the laws of England as may hereafter be selected by the Examiners, and also in mercantile book-keeping, and that the names of the books selected for examination in each year shall be furnished by the Examiners to the Registrar of Solicitors in the month of July in the previous year, and may be obtained from such registrar by applicants at any time afterwards.

Each applicant for the intermediate examination shall give to the Registrar of Solicitors one calendar month's previous notice in writing before such of the days appointed for examination as he may choose (within the six months hereinbefore limited) to be examined on, and shall, twenty-one clear days before such examination day, leave with the Registrar of Solicitors the articles and the assignment (if any) duly stamped and registered, under which the applicant is serving his clerkship, with answers to the questions as to his due service and conduct up to that time.

Upon compliance with such regulations, if the major part of the Examiners present at and conducting such examination shall be satisfied with the answers of the applicant in the subjects wherein he shall be so examined, the Examiners or the major part of them shall certify the same under their hands by a certificate to the following effect:—

In pursuance of the Rules and Regulations made by the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, We, being the major part of the Examiners conducting the Intermediate Examination of A.B., of _____ do hereby certify that we have examined him as required by the said Rules and Regulations, and that he has passed a satisfactory examination.

Dated this _____ day of _____ 18 ____.

In case the applicant shall fail to pass such intermediate examination to the satisfaction of the Examiners, he may attend the examination on the next or any subsequent examination day; but if he shall not have passed such intermediate examination before the expiration of twelve calendar months next after the date when one-half of his time of service shall have expired, his examination at the expiration of the term of service under his articles shall be postponed for so long a period as may intervene between the expiration of such twelve calendar months as last aforesaid, and his passing such intermediate examination for such shorter period as the Examiners shall in each case direct.

Each applicant on leaving his articles with the Registrar of Solicitors as above mentioned, shall pay a fee of 15s., and on receiving his certificate for such intermediate examination shall pay a fee of 15s., such fees being in each case payable to the Incorporated Law Society of the United Kingdom.

In conducting the intermediate examination, the principle on which marks shall be given for the answers to the questions shall be in the discretion of the Examiners, who shall have power, if they think fit, but shall not be obliged to adopt the principle, of giving minus or negative marks for incorrect or careless answers.

THE THIRD SCHEDULE.

Any person not previously admitted shall give notice in writing, signed by himself or his agent, to the Examiners six weeks at least before the first day of the month in which he shall propose to be examined, of his intention to apply for examination, by leaving the same with the Secretary of the Incorporated Law Society of the United Kingdom, at their Hall in Chancery Lane, which notice shall also state his place or places of residence and service for the last preceding twelve months, and, in case of application to be admitted on a refusal of the certificate, shall give or leave with the said secretary ten days' previous notice of such application, together with a copy of the petition; and any person applying to be admitted shall also, six weeks at least before the first day

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of the month in which he shall propose to be admitted as aforesaid, cause to be delivered at the Petty Bag Office a notice in writing signed by himself, containing a statement of his then place of abode, and the name or names and place or places of abode of the person or persons with whom he has served as an articulated clerk during the continuance of his articles of clerkship, and containing, in addition thereto, a statement of his place or places of abode or service for the last preceding twelve months, and the Clerk of the Petty Bag shall reduce all such notices into an alphabetical list under convenient heads, and shall three weeks at least before the first day of the month named in such notices affix such list in some conspicuous place in the Petty Bag Office, or in such other place or places as the Master of the Rolls shall from time to time appoint, and shall also at the time aforesaid furnish the Secretary of the Incorporated Law Society of the United Kingdom with a copy or copies of the said list.

Every person so proposing to be admitted a Solicitor of the Supreme Court, who shall have given such notice of his intention to apply for examination and admission as aforesaid, or as authorized by the rule, and who shall not have attended to be examined, or not have passed the examination, or not have been admitted, may, within one week after the end of the month for which such notices were given, renew the notices for examination or admission for the then next ensuing examination, and so from time to time as often as he shall think proper, and all such renewed notices shall be added to and placed up with the notices of admissions, and the applicants named in such renewed notices may be examined and admitted in the ordinary way, in pursuance of such last mentioned notices.

Every person applying to be examined for the purpose of being admitted a Solicitor of the Supreme Court, pursuant to the said rules, shall, at least twenty-one days before the day on which he is desirous of being examined, leave, or cause to be left, with the Secretary of the Incorporated Law Society of the United Kingdom, his articles of clerkship, duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant, and also by the Solicitor or Solicitors, London Agent, Barrister, or Special Pleader with whom he shall have served his clerkship.

In case the applicant shall show sufficient cause, to the satisfaction of the Examiners, why the first regulation cannot be fully complied with, it shall be in the power of the said Examiners, upon sufficient proof being given of the same, to dispense with any part of the first Regulation that they may think fit and reasonable.

Every person applying for admission shall also, if required, sign and leave, or cause to be left, with the Secretary of the Incorporated Law Society of the United Kingdom, answers in writing to such other written or printed questions as shall be proposed by the said Examiners, touching his said service and conduct, and shall also, if required, attend the said Examiners personally, for the purpose of giving further explanations touching the same, and shall also, if required, procure the Solicitor or Solicitors with whom he shall have served his clerkship as aforesaid, to answer, either personally or in writing, any question touching such service or conduct, or shall make proof to the satisfaction of the Examiners of his inability to procure the same.

Every person so applying shall also attend the Examiners at the Hall of the Incorporated Law Society of the United Kingdom, at such time or

times as shall be appointed for that purpose as the Examiners shall appoint, and shall answer such questions as the Examiners shall then and there put to him, by written or printed papers, touching his fitness and capacity to act as a Solicitor, and in the usual business transacted by a Solicitor.

Upon compliance with the Regulations, and if the major part of the Examiners actually present at and conducting the examination (one of them being an *ex-officio* Examiner) shall be satisfied as to the fitness and capacity of the person so applying to act as a Solicitor, the Examiners so present, or the major part of them, shall certify the same under their hands by a certificate to the following effect:—

We, being the major part of the Examiners duly appointed for conducting the Final Examination before admission of persons intending to become Solicitors of the Supreme Court, and having been actually present at and having conducted the examination of A.B., of _____ do here certify that we have examined him as required in that behalf, and we do testify that he is fit and capable to act as a Solicitor of the Supreme Court, and in the usual business transacted by Solicitors.

Questions as to due service of Articles of Clerkship.

To be answered by the Clerk.

1. What was your age at the date of your articles?
2. Have you served the whole term of your articles at the office where the Solicitor or Solicitors to whom you were articulated or assigned carried on his or their business? and if not, state the reason.
3. Have you, at any time during the term of your articles, been absent without the permission of the Solicitor or Solicitors to whom you were articulated or assigned? and if so, state the length and occasions of such absence.
4. Have you, during the period of your articles, been engaged or concerned in any profession, business, or employment other than your professional employment as clerk to the Solicitor or Solicitors to whom you were articulated or assigned?
5. Have you, since the expiration of your articles, been engaged or concerned, and for how long a time, in any and what profession, trade, business, or employment other than the profession of a Solicitor?

Questions to be answered by the Solicitor or Agent with whom the clerk may have served any part of the time under his articles (with such adaptations, if put to an Agent, as may be necessary).

1. Has A.B. served the whole term of his articles at the office where you carry on your business? and if not, state the reason.
2. Has the said A.B., at any time during the term of his articles, been absent without your permission? and if so, state the length and occasions of such absence.
3. Has the said A.B., during the period of his articles, been engaged or concerned in any profession or business, or employment, other than his professional employment as your articulated clerk?
4. Has the said A.B., during the whole term of his clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of a Solicitor?
5. Has the said A.B., since the expiration of his articles, been engaged or concerned, and for how long a time, in any and what

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Schedule.**

profession, trade, business, or employment, other than the profession of Solicitor?

And I do hereby certify that the said A.B. hath duly and faithfully served under his articles of clerkship [*or assignment, as the case may be*], dated the day of 18 for the term therein expressed, and that he is a fit and proper person to be admitted a Solicitor of the Supreme Court.

Questions to be answered by the Barrister or Special Pleader with whom the clerk may have been a pupil, under the 6th section of the Act 6 and 7 Vict., c. 73.

Has A.B. continued to be a pupil of yours, and has he been employed as such by you for any and what period during the term of his articles, being a term of [*] years, commencing on the day of ?

Has the said A.B., during the time of being such pupil of yours, been diligently employed as such pupil, and have you had occasion to be dissatisfied with his conduct in any, and, if any, in what respect?

Dated this 2nd day of November, 1875.

A. E. COCKBURN.
G. JESSEL.
COLERIDGE.
FITZROY KELLY.
ROBT. LUSH.
J. R. QUAIN.
GEORGE DENMAN.
R. PAUL AMPHLETT.
NATHL. LINDLEY.

* Four or five years, *as the case may be*.

PENDING BUSINESS.*

Notices,
Nov. 2nd,
1875.

Notices.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.†

The Master of the Rolls directs that, subject to any special Order which may be made in any cause, matter, or proceeding pending in his Court on the 1st of November, 1875, the following course of proceedings shall be adopted:—

That all causes, matters and proceedings (except causes, not being short causes, in which neither notice of motion for a decree has been served, nor replication has been filed before the 1st of November, 1875), shall, so far as relates to the form and manner of procedure, be continued and concluded in the same manner as they would have been in the Court of Chancery. That all pending causes (not being short causes), in which up to the 1st of November, 1875, no notice of the motion for a decree has been served, or replication filed, shall be continued in the same manner as they would have been continued in the High Court of Chancery up to the time at which such notice of motion or replication could have been served or filed, and shall from that period be continued according to the ordinary course of the High Court of Justice.

That any party to a pending cause may apply by summons at chambers that for special reasons a direction may be given for continuing such cause according to the ordinary course of the High Court of Justice.

* N.B.—Similar directions were given by each of the three Vice-Chancellors.

COMMON LAW DIVISIONS.

In order to save the expense and inconvenience of separate applications for directions as to the form and manner of procedure in actions commenced before the 1st of November instant, the Judge sitting at chambers,‡ hereby directs,

1. That,§ where no declaration has been delivered, the action shall be continued according to the ordinary course of the High Court of Justice, as if it had been commenced in that Court.

2. That, in all other cases, the action shall be continued, up to the close of the pleadings, according to the practice of the Court in which it was brought, and, afterwards, according to the provisions of the Judicature Act[s], subject, however, to an order at the instance

* These notices should be read in connection with s. 22 of the Principal Act, *supra*.

† W. N., 1875, Notices, pp. 468, 469. The notices are printed in small type as their force is very nearly spent now; but they are inserted in this Edition because they serve to throw light on many of the cases cited in it.

‡ Mr. Justice Lush, the learned author of the well known work on "The Practice of the Superior Courts of Law at Westminster."

§ "There," in W. N., 1875, Notices, p. 469, seems to be a misprint.

Notices,
Nov. 2nd,
1875.

of either party, to proceed, at any stage, according to the course prescribed by those Acts.*

By Order.

Judges Chambers, November 2nd, 1875.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

The President of the Probate, Divorce and Admiralty Division of the High Court of Justice,† has, by virtue of the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, directed that all causes, matters and proceedings which have been transferred to the Court, shall be continued and concluded in the High Court of Justice in the same manner as they would have been continued and concluded in the Court of Probate unless otherwise ordered.‡

THE COURT OF APPEAL.

Lord Cairns, C., when presiding in the Court of Appeal, on the 8th of November, 1875, made the following announcement:—Cases on appeal already stated and settled will be heard under the old procedure; but when the matter is still *in fieri*, and the case is not settled, it will be heard under the new practice, unless the parties agree otherwise.§

COUNSEL AND COSTS IN THE COURT OF APPEAL.

Notices.

1. COUNSEL.

On the argument of appeals the Court of Appeal will hear two Counsel on each side. Per Lord Cairns, C., in the Court of Appeal at Westminster, on the 8th of November, 1875.

2. COSTS.

As to cases which the Court of Appeal found standing for argument, the Court of Appeal has determined that the old practice as to costs shall be adopted; || but as to all other cases, THE COSTS WILL FOLLOW THE EVENT; when a judgment is reversed, the appellant will be allowed his costs. Per Lord Cairns, C., in the Court of Appeal at Westminster, on November 8th, 1875.¶

* See, for Cases at chambers under s. 22 of the Principal Act, 1 Charley's Cases (Chambers), 1-5; and 2 Charley's Cases (Chambers), 1, 2.

† Sir James Hannen.

‡ W. N., 1875 (Notices), p. 481.

§ W. N., 1875, p. 186.

|| *I.e.*, no costs will be given to a successful appellant.

¶ W. N., 1875, p. 186. See also, per James, L. J., in the Court of Appeal, at Lincoln's Inn, on November 10th in *Olivant v. Wright*, 46 L. J. (Ch.), 1, 4; W. N., 1875, p. 185; 1 Ch. D., 41.

TRANSFER OF ACTIONS BY THE LORD
CHANCELLOR.

Notices,
Nov. 10th,
1875.

Notice.

The Lord Chancellor will direct the transfer of any action on a written application to his Secretary, accompanied by the written consent of all parties. Where all parties do not consent, the application must be made to the Lord Chancellor in Court. Per James, L. J., in the Court of Appeal, on November 10th, 1875.*

SHORT CAUSES IN THE CHANCERY DIVISION.

Notice.

The Master of the Rolls gave notice on November 12th, 1875, that no actions will be heard as short, unless the evidence has been taken by affidavit; and that Counsel, therefore, ought not to certify that an action is proper to be heard as short, unless the evidence shall have been so taken.†

PAYMENT INTO COURT IN SATISFACTION IN
THE COMMON LAW DIVISIONS.*Notice.*

As money may now be paid into Court without leave at any time after service of the writ and before defence (Order XXX., Rule 2), summonses to stay on payment of a smaller sum will no longer be issued. Instead thereof, the amount should be paid into Court and the receipt sent to the plaintiff's solicitor with the notice. (Appendix B., Form 5.)

By Order of the Sitting Judge,‡ November 12th, 1875.§

MOTIONS TO ENTER JUDGMENT AND FOR
A NEW TRIAL IN THE COMMON LAW
DIVISIONS.*Notice.*

Blackburn, J., in the Queen's Bench Division, on the 17th of November, 1875, made the following announcement:—

* 1 Ch D., 41; W. N., 1875, p. 185.

† W. N., 1875, p. 194.

‡ Mr. Justice Lush.

§ *Times*, Nov. 16th, 1875.

Notices,
Nov. 17th,
1875.

In cases where parties have to move for judgment within twenty days, the case is to be set down by Counsel AT THE BOTTOM OF THE NEW TRIAL PAPERS in Court, and the case is to come on for argument as if the parties had moved the Court. Where the parties have to move within four days, Counsel must move for an order *nisi*. Where parties have moved for a new trial and also to enter judgment, the orders are to come on for argument together.*

MOTIONS, &c., IN THE COMMON LAW DIVISIONS.

HIGH COURT OF JUSTICE.

Notice.

Rules or Orders pending in one Division will not be taken in either the other Divisions.

Any motion in a new matter may be made in the Division sitting although the action or matter in which it is made is assigned to or is one of the other Divisions, and although it refers to business which has been assigned to a particular Division.

Cases set down in papers for a particular Division will not be taken either of the other Divisions.†

November 23rd, 1875.

By the Court.

RULES OF THE SUPREME COURT, DECEMBER, 1875.‡

At a meeting of the Judges of the Supreme Court, held on the 1st December, 1875, in pursuance of the Judicature Act, 1875. Present: The Right Honourable the Lord Chancellor, the Right Honourable the Lord Chief Justice of the Common Pleas, the Right Honourable the Lord Chief Baron, the Right Honourable the Lord Justice James, the Right Honourable the Lord Justice Mellish, the Right Honourable Sir Richard Bagge, Justice of Appeal, the Right Honourable Sir Robert Phillimore, the Right Honourable Sir James Hannen, Vice-Chancellor Malins, Vice-Chancellor Bacon, Vice-Chancellor Hall, Mr. Justice Blackburn, Mr. Justice Quain, Mr. Justice Field, Mr. Justice Brett, Mr. Justice Groves, Mr. Justice Archibald, Mr. Baron Bramwell, Mr. Baron Cleasby, Mr. Baron Pollock, Mr. Baron Amphlett, Mr. Baron Huddleston, the following

* W. N., 1875, p. 216; L. T., vol. LX., p. 53; *Lindsay v. Cundy*, Charley's Cases (Court), 139, 141. And see *Scarf v. The Steam Navigation Company*, W. N., 1876, p. 8. But see now Rule 4a of Order XL., and note thereto, *supra*.

† W. N., 1875 (Notices), p. 585.

‡ W. N., 1875 (Notices), p. 606. All the new Rules of Court will be found in the Schedule to the Supreme Court of Judicature Act, 1875 (Revised of the Supreme Court), duly inserted in their appropriate places.

new Rules of Court and alterations of existing Rules of Court were unanimously agreed to.

**New Rules,
Dec., 1875.**

1. The Rules in the First Schedule to the Supreme Court of Judicature Act, 1875, may be cited as "The Rules of the Supreme Court," and the Additional Rules of Court made by Order in Council of the 12th day of August, 1875, may be cited as "The Rules of the Supreme Court (Costs)," and these Rules may be cited as "The Rules of the Supreme Court, December, 1875," or each separate one of these Rules may be cited as if it had been one of "The Rules of the Supreme Court," and had been numbered by the number of the Order and Rule mentioned in the margin.

2. Form A. in the Appendix to these Rules shall be substituted for the Order II., form referred to in Order II., Rule 7, of "The Rules of the Supreme Court." Rule 7a.

3. The first paragraph of Rule 11 of Order V. of "The Rules of the Supreme Court," is hereby annulled, and the following shall stand in lieu thereof:— Rule 11.

*"In Admiralty actions in rem a warrant for the arrest of property, according to the Form B. in the Appendix to these Rules, may be issued at the instance either of the plaintiff or of the defendant at any time after the writ of summons has issued, but no warrant of arrest shall be issued except from the Principal Registry in London, and until an affidavit by the party or his agent has been filed, and the following provisions complied with."**

4. Order V., Rule 12, of "The Rules of the Supreme Court," is hereby annulled.† Order V.,
Rule 12.

5. Order IX., Rule 9, of "The Rules of the Supreme Court," is hereby annulled, and the following shall stand in lieu thereof: Order IX.,
Rule 9.

"In Admiralty actions in rem the warrant of arrest shall be served by the marshal or his substitutes, whether the property to be arrested be situate within the port of London or elsewhere within the jurisdiction of the Court, and the solicitor issuing the warrant shall, within six days from the service thereof, file the same in the Registry."‡

6. Order IX., Rule 10, of "The Rules of the Supreme Court," is hereby annulled, and the following shall stand in lieu thereof:— Order IX.,
Rule 10.

"In Admiralty actions in rem, service of a writ of summons against ship, freight, or cargo on board, is to be effected by nailing or affixing the original writ for a short time on the mainmast, or on the single mast of the vessel, and, on taking off the process, leaving a true copy of it nailed or fixed in its place."§

7. Where a defendant fails to appear to a writ of summons, issued out of a District Registry, and the defendant had the option of entering an appearance either in the District Registry or in the London office, judgment for want of appearance shall not be entered by the plaintiff until after such time as a letter posted in London on the previous evening, in due time for delivery to him on the following morning, ought, in due course of post, to have reached him. Order XIII.
Rule 5a.

* This new Rule is inserted in the Schedule to the Supreme Court of Judicature Act, 1875, as "Order V., Rule 11a," *supra*.

† This new Rule is inserted in the Schedule to the Supreme Court of Judicature Act, 1875, as "Order V., Rule 12a," *supra*.

‡ This new Rule is inserted in the Schedule to the Supreme Court of Judicature Act, 1875, as "Order IX., Rule 9a," *supra*.

§ This new Rule is inserted in the Schedule to the Supreme Court of Judicature Act, 1875, as "Order IX., Rule 10a," *supra*.

- Order XIII., Rule 10. 8. Order XIII., Rule 10, of "The Rules of the Supreme Court," is hereby annulled.*
- Ord. XXIII., Rule 2. 9. When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing, signed by the parties.
- Ord. XXXV., Rule 11a. 10. In an Admiralty action *in rem*, any person, who may have duly intervened and appeared, may remove an action from a District Registry as of right.
- Ord. XXXV., Rule 15. 11. Every District Registrar shall account for, and pay over to the Treasury, all monies paid into Court at the Registry of which he is Registrar, in such manner and at such times as may be from time to time directed by the Treasury.
- Order XXXVI., Rule 8. 12. Order XXXVI., Rule 8, of "The Rules of the Supreme Court," shall be read as if the words "to be" had been inserted before the words "entered for trial."†
- Order XXXVI., Rule 10a. 13. Unless within six days after notice of trial is given the cause shall be entered for trial by one party or the other, the notice of trial shall be no longer in force. This Rule is not to apply in any case in which notice of trial has been already given or to trials not in London or Middlesex.
- Order XXXVI., Rule 17. 14. The first sentence of Order XXXVI., Rule 17, shall be altered as follows:—The party entering the action for trial shall deliver to the officer two copies of the whole of the pleadings in the action, one of which shall be for the use of the Judge.
In the second sentence the word "copies" shall be substituted for "copy."‡
- Order LXI., Rule 4a. 15. The offices of each District Registrar of the High Court of Justice shall be open on every day and hour in the year on which the offices of the Registrar of the County Court of the place in which the District Registry is situate are required to be kept open.
- Ord. LVIII., Rule 19. 16. *In order to constitute Divisional Courts for the determination of appeals from Inferior Courts under section 45 of the Judicature Act, 1873, each Division of the High Court of Justice shall, before the 1st of January, 1876, select one of the Judges of such Division to act until the 1st of January, 1877, and so on before every 1st of January subsequent to the 1st of January, 1876, to act for the twelve months next ensuing.*
Any two or more of the Judges so selected shall constitute a Divisional Court for the purpose of the said section.
Any other Judge of the High Court of Justice may, by arrangement between himself and any one of the Judges so selected, act for such last-mentioned Judge in any particular case or cases, or on any particular day or days.
The Judges so selected shall make such arrangements as they shall think fit, as to the manner in which application may be made to them, or any of them, in Court or Chambers, under the 6th section of 38 & 39 Vict. c. 50, relative to appeals by motion under that Act.

* This new Rule is inserted in the Schedule to the Supreme Court of Judicature Act, 1875, as "Order XIII., Rule 10a," *supra*.

† This new Rule is inserted in the Schedule to the Supreme Court of Judicature Act, 1875, as "Order XXXVI., Rule 8a," *supra*.

‡ This new Rule is inserted in the Schedule to the Supreme Court of Judicature Act, 1875, as "Order XXVI., Rule 17a," *supra*.

APPENDIX.

New Rules,
Dec., 1875.

(A.)

*Writ of Summons in Admiralty Action in rem.**

187 [Here put the letter and number.]

In the High Court of Justice,
Admiralty Division.Between *A.B.*, Plaintiff,
and
the owners of the

Victoria, by the Grace of God, &c.,

To the owners and parties interested in the ship or vessel
of the port of [or cargo, &c., as the case may be].We command you, that within eight days after the service of this writ,
inclusive of the day of such service, you do cause an appearance to be
entered for you in the Admiralty Division of our High Court of Justice
in an action at the suit of *A.B.*; and take notice that in default of your
so doing the plaintiff may proceed therein, and judgment may be given
in your absence. Witness, Hugh MacCalmont, Baron Cairns, Lord High
Chancellor of Great Britain, this day of 18 .*Memorandum to be subscribed on the Writ.***N.B.**—This writ is to be served within (*twelve*) calendar months from the
date thereof, or, if renewed, from the date of such renewal, including
the day of such date, and not afterwards.The defendant (or defendants) may appear hereto by entering an
appearance (or appearances), either personally or by solicitor, at the
[] office at*Indorsements to be made on the Writ before Issue thereof.*

The plaintiff's claim is for, &c.

This writ was issued by *E.F.*, of , solicitor for the
said plaintiff, who resides at or, this writ was issued
by the plaintiff in person, who resides at [mention
the city, town, or parish, and also the name of the street and number of the
house of the plaintiff's residence, if any.]*Indorsement to be made on the Writ after service thereof.*This writ was served by *X.Y.* [here state the mode in which the service
was effected, whether on the owner, or on the ship, cargo, or freight, according
to Order IX., Rules 10, 11, and 12, as the case may be] on the
day of 18 .Signed,
*X.Y.** This new form is inserted in Part I. of Appendix (A) to the Schedule
to the Supreme Court of Judicature Act, 1875, as "No. 4a," *supra*.

**New Rules,
Dec., 1875.**

(B.)

*Warrant of Arrest in Admiralty Action in rem.**

187 [Here put the letter and number.]

*In the High Court of Justice,
Admiralty Division.*

Between A.B., Plaintiff,

and

the owners of the

Victoria, &c.

*To the Marshal of the Admiralty Division of Our High Court of Justice,
and to all and singular his substitutes. We hereby command you to arrest
the ship or vessel of the port of
[and the cargo and freight, &c., as the case may be], and to keep the same
under safe arrest, until you shall receive further orders from Us. Witness,
Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain,
this day of 18 .*

1876.

ORDER AS TO FEES TO BE TAKEN BY ANY OFFICIAL REFEREES THAT MAY BE AT- TACHED TO THE SUPREME COURT.†

The Right Honourable Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, by and with the advice and consent of the undersigned Judges of the Supreme Court, and with the concurrence of the Lords Commissioners of Her Majesty's Treasury, doth hereby, in pursuance and execution of the powers given by the Supreme Court of Judicature Act, 1875,† and all

* This new form is inserted in Part I. of Appendix (A) to the Schedule to the Supreme Court of Judicature Act, 1875, as "No. 4b," *supra*.

† This Order is rescinded by the new "Order as to the Fees to be taken by the Official Referees," dated April 24th, 1877. The chief alteration is the substitution of the small lump sum of £5 "for the entire reference, irrespective of the time occupied," for the fee of £1. 1s. per hour, which fell very heavily on suitors.

The present Order is retained, like the repealed enactments of the Supreme Court of Judicature Acts, for the purpose of comparison. See the note prefixed to the repealed Schedule to the Principal Act, *supra*.

As to Official Referees, see ss. 56, 57, 58, 59 and 83 of the Principal Act; Order XXXVI., Rules 29a, 29b, 29c, 30, 31, 32, 33 and 34; and Order LXI., Rule 8, and the notes thereto, *supra*.

‡ Section 26. By that enactment the Lord Chancellor, with the advice and consent of any three Judges of the Supreme Court, may fix the fees to be taken by any officer paid wholly or partly out of public moneys, and attached to the Supreme Court.

other powers and authorities enabling him in this behalf, and to act direct, in manner following.

Referees,
Feb. 1, 1876.

The fees to be taken by any Official Referee to be attached to the Supreme Court under the provisions of section eighty-three of the Supreme Court of Judicature Act, 1873, shall be as follows:—

Upon a reference, for every hour or part of an hour the Official Referee is occupied, £1. 1s.

Where the sittings under a reference are to be held elsewhere than in London, there shall be paid in addition to the above, £1. 11s. 6d. for every night the Official Referee, and 15s. for every night the Official Referee's clerk is absent from London, together with reasonable costs of their locomotion* from London and back.†

A deposit on account of fees and expenses before proceeding with such reference, or at any time during the course thereof, may be required, and a memorandum thereof shall be delivered to the party making the deposit.‡

Where the sittings are held elsewhere than in London, the Plaintiff in the action shall provide, at his expense, a place to the satisfaction of the Official Referee in which the sittings may be held.§

Upon the conclusion of the sittings on a reference, the Official Referee shall forthwith transmit to the Treasury a return according to the form annexed,|| on which shall be affixed stamps equal in amount to the fees and moneys received for such sitting and expenses.

The Official Referees shall conform to any regulations that may be made from time to time by the Treasury for the accounting for all fees and moneys paid to them.¶

CAIRNS, C.
G. BRAMWELL,
WM. BALIOL BRETT,
JAMES HANNEN.

1st February, 1876.

We certify that this Order is made with the concurrence of the Commissioners of Her Majesty's Treasury.

ROW. WINN,
J. D. H. ELPHINSTONE.

* By s. 83 of the Supreme Court of Judicature Act, 1875, "all proper and reasonable travelling expenses incurred by the Official Referees" in the discharge of their duties, shall be paid by the Treasury out of moneys to be provided by Parliament.

† This paragraph is reproduced in the Order as to Official Referees' fees of the 24th of April, 1877, but "on the business of the reference," is there inserted after the words "absent from London."

‡ This paragraph is reproduced in the Order as to Official Referees of the 24th of April, 1877, with the substitution of "of the amount deposited" for "thereof," after "memorandum."

§ This paragraph is reproduced in the Order as to Official Referees of the 24th of April, 1877, with the useful amendment of substituting "the party proceeding with the reference" for "the plaintiff."

|| There is no provision for a similar form in the Order as to Official Referees of the 24th of April, 1877.

¶ This paragraph is reproduced in the Order as to Official Referees of the 24th of April, 1877, with the omission of the words "fees and," and substitution of "all" for "any."

| | | | | |
|--|-------------|----------------|------------------|----|
| <i>Sittings held at</i> | | | | |
| 1876. | <i>from</i> | <i>a.m. to</i> | <i>p.m.</i> | |
| " | " | <i>a.m. to</i> | <i>p.m.</i> | |
| " | " | <i>a.m. to</i> | <i>p.m.</i> | |
| <i>Travelled to</i> | | | | |
| " <i>from</i> | | | | |
| <i>Fee for subsistence</i> | | | <i>nights at</i> | |
| <i>per night =</i> | .. | .. | .. | .. |
| <i>Cost paid by auditor for locomotion</i> | .. | .. | .. | .. |

L.M.,

Official Referee

*(NOTE.—Stamps of the value of
the total to be affixed here.)*

CAUSES AND ACTIONS WITH BEFORE THE MASTER OF THE

Notice.

No special days will in future be fixed for
actions with witnesses [before the Master of

All causes and actions with witnesses must be
marked by the plaintiff's solicitor, and there
so marked by the officer in the Cause Book.

out witnesses, and will be put in the paper on Mondays and Fridays, but if with witnesses will not be heard on those days. Witnesses.
Feb. 3, 1876.

R. H. LEACH,
Registrar.

Chancery Registrar's Office,
February 3rd, 1876.

ORDER IN COUNCIL* AS TO JUDGES' CIRCUITS.

FEBRUARY 5TH, 1876.†

AT the Court at Osborne House, Isle of Wight, the 5th day of February, 1876.

PRESENT,

The QUEEN'S most Excellent Majesty in Council.

WHEREAS by section 23 of the Supreme Court of Judicature Act, 1875, it is enacted that Her Majesty may at any time after the passing of the Act, by Order in Council, provide in such manner and subject to such regulations as to Her Majesty may seem most meet for all or any of the matters thereafter specified, amongst which were the discontinuance, either temporarily or permanently, wholly or partially, of any existing Circuit, and the formation of any new Circuit by the union of any counties or parts of counties, or partly in one way and partly in the other, or by the constitution of any county or part of a county to be a Circuit by itself; and in particular the issue of Commissions for the discharge of civil and criminal business in the County of Surrey, to the Judges appointed to sit for the trial by jury of causes and

* Power to issue Orders in Council on this subject had previously been given by the 3 & 4 Wm. IV. c. 71, and the 26 & 27 Vict. c. 122.

† W. N., 1876 (Notices), p. 87. This Order in Council has the same effect as if it were enacted in the Supreme Court of Judicature Act, 1875 (s. 23 of that Act).

Circuits,
Feb. 5, 1876.

issues in Middlesex or London, or any of them ; and the appointment of the place or places at which Assizes are to be holden on any Circuit ; and by the same section it is further enacted that in making any order thereunder Her Majesty may give any directions which it appears to Her Majesty to be desirable to give for the purpose of giving full effect to such order :

As to Circuits, see ss. 11, 26, 29, 37, 76, and 93 of the Principal Act, s. 23 of the Amending Act, and Order XXXVI., *supra*.

It is therefore ordered by the Queen's most Excellent Majesty, by and with the advice of Her most Honourable Privy Council, as follows :—

1. The existing Circuits shall be discontinued, and instead thereof the Circuits shall be those named in the first column of the Schedule hereto.

"The existing Circuits," said Dr. Stephen, writing in 1874, "are the 'Home,' the 'Midland,' the 'Norfolk,' the 'Oxford,' the 'Northern,' the 'Western,' the 'North Wales,' and the 'South Wales Circuit.'"^{*}

By an Order in Council issued under the 26 & 27 Vict. c. 122, in December, 1863, Her Majesty directed that the Northern, the Midland, and the Norfolk Circuits should be altered as follows :—"The County of York and the County of the City of York shall be taken away from the Northern Circuit, and annexed to the Midland Circuit, and the Counties of Leicester, and of Rutland, and of Northampton, shall be taken away from the Midland Circuit and annexed to the Norfolk Circuit." The alterations took effect from the 8th December, 1863.[†]

2. The said Circuits shall be respectively constituted as specified in the second column of the said Schedule, and the places where Assizes may be held shall be the places at which Assizes have hitherto been held.

For a list of the places where the Assizes are held, see "The Law List."

3. Nothing in this Order shall affect the provisions of an Order in Council made on the 4th day of May, 1864,

^{*} 3 Steph. Comm., 352. n. (r.), 7th edn.

[†] See the *Law Times*, Vol. xxxix., p. 73. The Bar of the Northern Circuit, who were members of it on the 8th of December, 1863, have the right to attend the Assizes for the County and the City of York. The Bar of the Midland Circuit, who were members of it on the 8th of Dec., 1863, claim the right to attend the Assizes for Leicester, Rutland, and Northampton.

relating to the division of the County of Lancaster into three Divisions, or the provisions of an Order in Council made on the 10th day of June, 1864, as amended by an Order in Council made on the 9th day of July, 1864, relating to the division of the County of York into two Divisions. Circuits,
Feb. 5, 1876.

4. The North and South Wales Circuit shall be divided into two Divisions, the North Wales Division and the South Wales Division ; and such Divisions shall be respectively constituted as specified in the second column of the said Schedule.

The Divisions correspond to the former North Wales and Chester Circuit and the former South Wales and Chester Circuit, respectively.

5. The County of Surrey shall not be included in any Circuit, but Commissions shall be issued not less often than twice in every year for the discharge of civil and criminal business therein.

The Judges recommended that " no Assizes shall be held in or for the County of Surrey ; " * but this recommendation was received with dissatisfaction.

6. With respect only to the first time after the date of this Order that Justices of Assize go the several Circuits as constituted by this Order, and with respect only to the first Sessions held after the date of this Order under Commissions for the discharge of civil and criminal business in the County of Surrey, the following arrangements shall be observed :—†

With respect to the Northern Circuit :

In the County of Cumberland and the County of Westmoreland, Edward Bromley, Esq. (hitherto Clerk of Assize on the Northern Circuit, as discontinued by this Order), and his Officers, shall be Clerk of Assize and Officers of Clerk of Assize. In the County of

* Return to an Order of the House of Commons, dated the 31st of July, 1874. See note to s. 23 of the Supreme Court of Judicature Act, 1876, *supra*.

† These arrangements, by an Order in Council of the 17th of May, 1876, are to continue to operate until modified or revoked by any subsequent Order in Council.

**Circuits,
Feb. 5, 1876.**

Lancaster, so far as relates to the discharge of criminal business, Thomas Starkie Shuttleworth, Esq. (hitherto Clerk of the Crown for the same county), and his Officers, shall be Clerk of Assize and Officers of Clerk of Assize; and so far as relates to the discharge of civil business, Thomas Edmund Paget, Esq. (formerly Prothonotary of the Court of Common Pleas in the same county), and his Officers, shall be Clerk of Assize and Officers of Clerk of Assize.

With respect to the North-Eastern Circuit:

In the County of Durham, so far as relates to the discharge of criminal business, John Wetherell Hays, Esq. (hitherto Clerk of the Crown for the same county), and his Officers, shall be Clerk of Assize and Officers of Clerk of Assize; and so far as relates to the discharge of civil business, William C. Ward, Esq. (formerly Prothonotary of the Court of Pleas in the same county), and his Officers, shall be Clerk of Assize and Officers of Clerk of Assize; and on the rest of the Circuit, Edward Bromley aforesaid, and his Officers, shall be Clerk of Assize and Officers of Clerk of Assize.

With respect to the Midland Circuit:

Arthur Duke Coleridge, Esq. (hitherto Clerk of Assize on the Midland Circuit, as discontinued by this Order), and his Officers, shall be Clerk of Assize and Officers of Clerk of Assize.

With respect to the South-Eastern Circuit:

In the County of Norfolk, the County of the City of Norwich, the County of Suffolk, the County of Huntingdon, and the County of Cambridge, Charles Platt, Esq. (hitherto Clerk of Assize on the Norfolk Circuit as discontinued by this Order), and his Officers, shall be Clerk of Assize and Officers of Clerk of Assize; and in the County of Hertford, the County of Essex, the County of Kent, and the County of Sussex, the Honourable Richard Denman (hitherto Clerk of Assize on the Home Circuit, as discontinued by this Order), and his Officers, shall be Clerk of Assize and Officers of Clerk of Assize.

With respect to the Oxford Circuit:

Edward Archer Wilde, Esq. (hitherto Clerk of Assize on the Oxford Circuit, as discontinued by this Order), and his Officers, shall be Clerk of Assize and Officers of Clerk of Assize.

With respect to the Western Circuit:

William Channell Bovill, Esq. (hitherto Clerk of Assize on the Western Circuit, as discontinued by this Order), and his Officers, shall be Clerk of Assize and Officers of Clerk of Assize.

With respect to the North and South Wales Circuit:

In the North Wales Division thereof, Henry Crompton, Esq. (hitherto Clerk of Assize in the North Wales Division of the North and South Wales Circuit, as discontinued by this Order), and his Officers, shall be Clerk of Assize and Officers of Clerk

of Assize; and in the South Wales Division thereof, Henry Halford Vaughan, Esq. (hitherto Clerk of Assize in the South Wales Division of the North and South Wales Circuit, as discontinued by this Order), and his Officers, shall be Clerk of Assize and Officers of Clerk of Assize.

**Circuits,
Feb. 5, 1876.**

With respect to the County of Surrey:

The Honourable Richard Donman aforesaid, and his Officers, shall be Clerk of Assize and Officers of Clerk of Assize for the first Sessions held under Commissions issued for the discharge of civil and criminal business in the said county.

C. L. PEEL.

SCHEDULE.

Northern Circuit*—County of Westmoreland, County of Cumberland, County of Lancaster.

North-Eastern Circuit†—County of Northumberland, County of the Town of Newcastle-upon-Tyne, County of Durham, County of York, County of the City of York.

Midland Circuit‡—County of Lincoln, County of the City of Lincoln, County of Nottingham, County of the Town of Nottingham, County of Derby, County of Warwick, County of Leicester, Borough of Leicester, County of Northampton, County of Rutland, County of Buckingham, County of Bedford.

South-Eastern Circuit§—County of Norfolk, County of

* The Judges recommended that this Circuit should be called the "North-Western Circuit," but the old name has happily been preserved. The Circuit previously comprised Northumberland and Durham, as well as Westmoreland, Cumberland and Lancaster. As to York, see the note to Rule 1 of this Order, *supra*.

† The counties which comprise this Circuit all belonged to the old Northern Circuit. York was severed in 1863 from the old Northern Circuit and annexed to the Midland.

‡ Rutland, Leicester, Northampton, Buckingham, and Bedford previously formed part of the (abolished) Norfolk Circuit. York formed part of the Midland Circuit.

§ Norfolk, Suffolk, Huntingdon, and Cambridge, previously belonged to the (abolished) Norfolk Circuit. Hertford, Essex, Kent, and Sussex previously belonged to the (abolished) Home Circuit. As to Surrey, which formed part of the Home Circuit, see Rule 5 of this Order, *supra*.

Circuits,
Feb. 5, 1876.

the City of Norfolk,* County of Suffolk, County of Huntingdon, County of Cambridge, County of Hertford, County of Essex, County of Kent, County of Sussex.

Oxford Circuit†—County of Berks, County of Oxford, County of Worcester, County of the City of Worcester, County of Stafford, County of Salop, County of Hereford, County of Monmouth, County of Gloucester, County of the City of Gloucester.

Western Circuit‡—County of Southampton, County of Wilts, County of Dorset, County of the City of Exeter, County of Devon, County of Cornwall, County of Somerset, County of the City of Bristol.

North and South Wales Circuit§—(a) North Wales Division—County of Montgomery, County of Merioneth, County of Caernarvon, County of Anglesea, County of Denbigh, County of Flint, County of Chester. (b) South Wales Division—County of Glamorgan, County of Carmarthen, County of the Borough of Carmarthen, County of Pembroke, County of the Town of Haverfordwest, County of Cardigan, County of Brecknock, County of Radnor.

RULES OF THE SUPREME COURT, FEBRUARY, 1876.||

At a meeting of the Judges of the Supreme Court, held on the 23rd of February, 1876, in pursuance of the [Supreme Court of] Judicature Act, 1875. Present: The Right Honourable the Lord Chancellor, The Right

* Query, Norwich?

† This corresponds exactly with the former Oxford Circuit.

‡ This corresponds exactly with the former Western Circuit.

§ This Circuit is formed by the union of the North Wales and Chester Circuit and the South Wales and Chester Circuit. The old distinction between these two Circuits is, to some extent, kept up, by the separation of the Circuit into Divisions corresponding with the old Circuits respectively.

|| W. N., 1876 (Notices), p. 145. These new Rules will be found inserted in their appropriate places in the Schedule to the Supreme Court of Judicature Act, 1875, *supra*.

New Rules,
Feb., 1876.

Honourable the Lord Chief Justice of England, The Right Honourable the Master of the Rolls, The Right Honourable the Lord Chief Baron, The Right Honourable the Lord Justice Mellish, The Right Honourable Sir Richard Baggallay, Justice of Appeal, The Right Honourable Sir Robert Phillimore, The Right Honourable Sir James Hannen, Vice-Chancellor Malins, Vice-Chancellor Bacon, Mr. Justice Blackburn, Mr. Justice Mellor, Mr. Justice Lush, Mr. Justice Quain, Justice Field, Mr. Justice Brett, Mr. Justice Grove, Mr. Justice Hannan, Mr. Justice Lindley, Mr. Justice Archibald, Mr. Baron Swell, Mr. Baron Cleasby, Mr. Baron Pollock, Mr. Baron Amphlett, Baron Huddleston.

The following new Rules of Court and alterations of existing Rules of Court were unanimously agreed to, and ordered to be in force on and after the 3rd day of March, 1876.

1. These Rules may be cited as "The Rules of the Supreme Court, February, 1876," or each separate one of these Rules may be cited as if it had been one of "The Rules of the Supreme Court," and had been numbered by the number of the Order and Rule mentioned in the margin.*

ORDER IV.—INDORSEMENT OF ADDRESS.

2. Notwithstanding anything to the contrary contained in Order IV. of "The Rules of the Supreme Court," Rules 1 and 2 of such Order shall only apply where the writ of summons is issued out of the London Office. Order IV., Rule 2a.

3. Order IV., Rule 3, is hereby annulled, and the following shall stand in lieu thereof:— Order IV., Rule 3a.

In all cases where a writ of summons is issued out of a District Registry the solicitor shall give on the writ the address of the plaintiff, and his own name or firm and his place of business, which shall, if his place of business be within the district of the Registry, be an address for service, and if such place be not within the district, he shall add an address for service within the district, and where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar; and where the solicitor issuing the writ is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor. Where the plaintiff sues in person he shall give on the writ his place of residence and occupation, which shall, if his place of residence be within the district, be an address for service, and if such place be not within the district he shall add an address for service within the district, and, where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar.

ORDER V.—ISSUE OF WRITS OF SUMMONS.

4. Rule 3 of "The Rules of the Supreme Court, December, 1875," is hereby annulled, and the following Rule substituted:— Order V., Rule 11a.

The first paragraph of Rule 11 of Order V. of "The Rules of the Supreme Court" is hereby annulled, and the following shall stand in lieu thereof:—

"In Admiralty actions *in rem* a warrant for the arrest of property according to the Form (A.) in the Appendix to these Rules may be issued at the instance either of the plaintiff or of the defendant at any time after the writ of summons has issued, but no warrant of arrest shall be

* See Rule 1 of the Rules of the Supreme Court, December, 1875, *supra*.

**New Rules,
Feb., 1876.** issued until an affidavit by the party or his agent has been filed, and the following provisions complied with.*

ORDER XII.—APPEARANCE.

Order XII.,
Rule 6a.

5. Order XII., Rule 6, is hereby annulled, and the following shall stand in lieu thereof:—

“A defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing, dated on the day of delivering the same, and containing the name of the defendant’s solicitor, or stating that the defendant defends in person.”

“A defendant who appears elsewhere than where the writ is issued, shall on the same day give notice of his appearance to the plaintiff’s solicitor, or to the plaintiff himself, if he sues in person, either by notice in writing, served in the ordinary way, at the address for service within the district of the District Registry, or by prepaid letter directed to such address, and posted on that day in due course of post.”

ORDER XXVII.—AMENDMENT OF PLEADINGS.

Order
XXVII.,
Rule 11.

6. The Court or a Judge, may, at any stage of the proceedings, allow the plaintiff to amend the writ of summons in such manner, and on such terms, as may seem just.

ORDER LV.—Costs.

Order LV.

7. In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such time or times, and in such manner and form, as the Court or a Judge shall direct.†

ORDER LVII.—TIME.

Order LVII.,
Rule 7.

8. In Admiralty actions the Court or a Judge shall have power, at any stage of the proceedings in such action, upon a motion or summons by either party, calling upon the other party to show cause why the trial of such action should not take place on an early day, to be appointed by the Court or a Judge, to appoint that such trial shall take place on any day, or within any time which to the Court or Judge shall seem fit; and for such purpose the Court or Judge shall have power upon such motion or summons to dispense with the giving of notice of trial, or to abridge the time or times appointed by these Rules for giving such notice, for the delivery of pleadings, or for doing any other act or taking any other proceeding in the action, upon such terms (if any) as the nature of the case may require.

ORDER LXI.—SITTINGS AND VACATIONS.

Order LXI.,
Rule 4a.

9. The offices of the Supreme Court (including the Judges’ chambers) shall close on Saturdays at 2 o’clock.‡

Order LXI.,
Rule 10.

10. The Official Referees shall sit at least from 10 a.m. to 4 p.m. on every day during the Michaelmas, Hilary, Easter, and Trinity sittings of

* This new Rule is inserted in the Schedule to the Supreme Court of Judicature Act, 1875 (Rules of the Supreme Court), *supra*, as “Order V., Rule 11b.”

† This new Rule will be found inserted in its appropriate place in the Schedule to the Supreme Court of Judicature Act, 1875, *supra*, as “Order LV., Rule 2.”

‡ This new Rule will be found inserted in the Schedule to the Supreme Court of Judicature Act, 1875, *supra*, as “Order LXI., Rule 4b.”

the High Court of Justice, except on Saturdays, during such sittings, when they shall sit, at least, from 10 a.m. to 2 p.m. ; but nothing in this Rule shall prevent their sitting on any other days.*

**New Rules,
Feb., 1876.**

(A.)

Warrant of Arrest in Admiralty Action in rem.†

187 [Here put the letter and number.]

In the High Court of Justice,
Admiralty Division.

Between *A.B.*, Plaintiff,

and

the Owners of the

Victoria, &c.,

To the Marshal of the Admiralty Division of Our High Court of Justice, and to all and singular his substitutes [or To the Collector or Collectors of Customs at the port of]. We hereby command you to arrest the ship or vessel of the port of [and the cargo and freight, &c., as the case may be], and to keep the same under safe arrest, until you shall receive further orders from Us. Witness, Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, this day of 18 .

NAME OF OFFICIAL REFEREE.‡

Notice.

HIGH COURT OF JUSTICE.—CHANCERY DIVISION.

All orders of reference to an Official Referee in rotation must be taken to the acting Senior Clerk in the Chancery Registrar's Office, in order that the name of the particular Referee in rotation may be ascertained and specified. As every reference is to be recorded at the Registrar's Office, any order of reference already made to any particular Referee by name must be produced there before they are acted upon, in order that they may be inserted in the Index or Record.§

* This new Rule will be found inserted in the Schedule to the Supreme Court of Judicature Act, 1875, *supra*, as "Order LXI., Rule 8."

† This form will be found inserted in Part I. of the Appendix (A) to the Schedule to the Supreme Court of Judicature Act, 1875, *supra*, as "No. 4c."

‡ See the new Rules 29b, 29c, and 29d, of Order XXXVI., *supra*. The notice refers more particularly to Rule 29c.

§ W. N., 1876 (Notices), p. 164.

Stamps,
Apr. 22, 1876.

STAMPS.

ORDER OF THE 22ND OF APRIL, 1876, AS TO THE FEES AND PERCENTAGES WHICH ARE REQUIRED TO BE TAKEN IN THE SUPREME COURT OF JUDICATURE BY MEANS OF STAMPS.*

WHEREAS by section 26 of the Supreme Court of Judicature Act, 1875, it is provided that the fees and percentages appointed to be taken in the High Court of Justice and in the Court of Appeal, and in any Court to be created by any Commission, and in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, shall, except so far as they be otherwise directed, be taken by means of stamps: and further, that such stamps shall be impressed or adhesive, as the Treasury may from time to time direct; and that the Treasury, with the concurrence of the Lord Chancellor, may from time to time make such rules as may seem fit for publishing the amount of the fees and regulating the use of such stamps, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for ensuring the proper cancellation of such stamps and for keeping account of such stamps.

And whereas by an Order made under the same section of the said Act, on the 28th day of October, 1875, it was (amongst other things) provided† that the stamps to be used in the collection of the fees and percentages therein mentioned should, until further notice, be either impressed or adhesive as directed in any previous Order, and in cases to which no previous Order was applicable should

* W. N., 1876 (Notices), p. 220. This Order must be read in connection with the Order as to Stamps of the 28th October, 1875, *supra*.

† By Rule 2 of the Order, *supra*.

be either impressed or adhesive, at the option of the parties by whom the fees were payable, and it was also provided* that up to the beginning of the sittings on the 25th day of April, 1876,† the adhesive stamps used before the publication of the said Order in the Courts of Chancery and Common Law should be available, and might be used, in the Supreme Court of Judicature.

Stamps,
Apr. 23, 1876.

And whereas it is expedient to further extend the use of the same stamps,‡ and to make other provisions in lieu of, and in addition to,§ those contained in the said Order of the 28th day of October, 1875.

Now, we, the undersigned, being two of the Lords Commissioners of Her Majesty's Treasury, do, with the concurrence of the Lord Chancellor, hereby give notice and order and direct:

1. That from and after the 25th day of April, 1876, the stamps used for denoting the said fees and percentages shall be of the character, and be applied and otherwise dealt with, as prescribed by the Schedule hereto.

"Of the character." See the third column of the Schedule hereto, "Character of stamp to be used."

"Be applied." See the second column of the Schedule, "Document to be stamped."

"Otherwise dealt with." See the "General Directions," at the end of the Schedule.

2. That the adhesive stamps at present in use in the Supreme Court of Judicature shall continue to be used so long as they are supplied by the Commissioners of Inland Revenue.

See Rule 3 and the proviso to Rule 4 of the Order as to Stamps of the 28th of October, 1875.

3. That in any case in which a deposit on account of

* By Rule 4 of the Order, *supra*.

† "Up to the beginning of the sittings to take place after January next."

‡ See Rule 2 of this Order, *infra*.

§ See Rule 1 of this Order, *infra*.

Stamps,
Apr. 22, 1876. probable fees and expenses is required, the following regulations shall be observed:—

As to DEPOSITS.

- (a.) The party, or his solicitor, from whom under any Order as to Court Fees a deposit may be required, shall, before the matter or cause be proceeded with, present for the signature of the Officer of the Court requiring the deposit, a certificate, duly stamped, for the amount of such deposit. Forms of certificates provided by the Commissioners of Inland Revenue may be obtained at the Inland Revenue Office, Somerset House, or at such other places as the Commissioners may appoint.
- (b.) When the fees and expenses are ascertained, the said Officer of the Court shall endorse upon the said certificate the amount thereof.
- (c.) If the amount is in excess of the deposit, the certificate, bearing an additional stamp equal to the excess, must be produced to the said Officer before he delivers his judgment or award, or gives his decision in the matter or cause.
- (d.) If the amount of the fees and expenses is less than the deposit, the holder of the certificate may obtain repayment of the difference upon presenting the certificate so endorsed at the Inland Revenue Office, Somerset House.

“Under any Order as to Court Fees.” A deposit “may be required” by the Order as to Court Fees of October 28th, 1875, *supra*, under the following heads:—“Attendances;” “Examination of Witnesses;” “Taking Accounts;” and “Taxation of Costs.” Also, under the head, “Miscellaneous,” “upon a reference to a Master of the Queen’s Bench, Common Pleas, or Exchequer Division, or a District Registrar, for the purpose of any investigation or inquiry, other than the taking of an account.”

THE SCHEDULE ABOVE REFERRED TO.*
 SUMMONSES, WRITS, COMMISSIONS, AND WARRANTS.

Schedule,
 Ap. 22, 1876.

| | Document to be stamped. | Character of Stamp to be used. | Regulations and Observations. |
|---|--------------------------------------|--------------------------------|--|
| On sealing a writ of summons for commencement of an action | Writ of summons | Impressed or adhesive | Forms of writ with the impressed stamp will be sold at the Inland Revenue Office and by Law Stationers |
| On sealing a concurrent, renewed or amended writ of summons for commencement of an action | | | |
| On sealing a notice for service under Order XVI., Rule 18 | Notice .. | Impressed or adhesive | Forms with the impressed stamp will be sold at the Inland Revenue Office and by Law Stationers |
| On sealing a writ of mandamus or injunction | Præcipe left at time of issuing writ | Impressed | Præcipes with the impressed stamp will be sold at the Inland Revenue Office and by Law Stationers |
| On sealing a writ of <i>subpoena</i> not exceeding three persons | | | |
| On sealing every other writ | Summons | Impressed | A form of summons will be sold at the Inland Revenue Office and by Law Stationers |
| On sealing a summons to originate proceedings in the Chancery Division | | | |
| On sealing a duplicate thereof | Duplicate summons | Impressed | |
| On sealing a copy of same for service | Copy of summons | Impressed or adhesive | |
| On sealing or issuing any other summons or warrant | Summons | Impressed or adhesive | |
| On sealing or issuing a commission to take oaths or affidavits in the Supreme Court | Commission | Impressed | Forms of commission with the impressed stamp will be sold at the Inland Revenue Office |

* It will be found, on examination, that the Schedule minutely follows the Schedule to the Order as to Court Fees of October 28th, 1875, which see *supra*.

Schedule.
Ap. 22, 1876.

| | Document to be stamped. | Character of Stamp to be used. | Regulations and Observations. |
|--|-------------------------|--------------------------------|---|
| Every other commission | Commission | Impressed | { The commission or the copy of petition to be written on impressed paper, or the document to be produced at the Inland Revenue Office to be stamped. |
| On marking a copy of a petition of right for service | Copy of petition | Impressed | |

APPEARANCES.

The fee payable on entering an appearance to be denoted by an impressed stamp on the form of memorandum as prescribed by the Appendix to the Supreme Court of Judicature Act, 1875,* and where the appearance of more than one person is entered by the same memorandum, the fees for all persons beyond the first to be denoted by means of impressed or adhesive stamps.

Forms of memorandum of appearance with the impressed stamp for one or more defendants will be sold at the Inland Revenue Office and by Law Stationers.

COPIES.

| | Document to be stamped. | Character of Stamp to be used. |
|---|-------------------------|--------------------------------|
| For a copy of a written deposition of a witness to enable a party to print the same | Copy .. | Impressed or adhesive |
| For examining a written or printed copy, and marking same as an office copy | Copy .. | Impressed or adhesive |
| For making a copy and marking same as an office copy | Copy .. | Impressed or adhesive |
| For a copy in a foreign language .. | Copy .. | Impressed or adhesive |
| For a copy of a plan, map, section, drawing, photograph, or diagram | Præcipe or copy | Impressed or adhesive |
| For a printed copy of an order, not being an office or certified copy | Copy .. | Impressed or adhesive |

ATTENDANCES.

The fees payable under this heading to be denoted either by an impressed or adhesive stamp on the *subpoena*, notice, or other document requiring the attendance of the officer.

* See Appendix (A), Form No. 6, and Order XII., Rule 10, *supra*.

STAMPS.

979

If the officer's attendance be required beyond one day, the additional fee per diem after the first to be taken by means of a *præcipe* with the impressed stamp, filed in the department from which the officer is summoned. Schedule,
Ap. 22, 1878.

OATHS, &c.

| | Document to be stamped. | Character of Stamp to be used. | Regulations and Observations. |
|--|---|--------------------------------|-------------------------------|
| For taking an affidavit or an affirmation or attestation upon honour in lieu of an affidavit or a declaration, except for the purpose of receipt of dividends from the Paymaster-General, on which no fee is payable | Affidavit or other document answering thereto | Impressed or adhesive | |
| And in addition thereto, for each exhibit therein referred to and required to be marked | Stamp to be impressed or adhesive on exhibit if practicable, but if not, to be impressed on <i>præcipe</i> filed. | | |

FILING.

| | Document to be stamped. | Character of Stamp to be used. | Regulations and Observations. |
|---|--|--------------------------------|---|
| On filing a special case or petition of right | Special case, petition of right, or <i>præcipe</i> | Impressed | Where practicable, stamp to be on special case or petition of right, and in other cases on <i>præcipe</i> filed |
| On filing an affidavit with exhibits (if any) annexed, submission to arbitration, award, bill of sale, warrant of attorney, cognovit, bail, satisfaction piece, and writ of execution with return | Document filed | Impressed or adhesive | |
| On filing a scheme pursuant to the statute 30 and 31 Vict., c. 127, or the Liquidation Act, 1868 | Scheme .. | Impressed | |
| On filing a <i>caveat</i> .. | <i>Caveat</i> .. | Impressed | |

Schedule,
Ap. 22, 1876.

CERTIFICATES.

| | Document to be stamped. | Character of Stamp to be used. | Regulations and Observations. |
|--|-------------------------|--------------------------------|---|
| For a certificate of appearance or of a pleading, affidavit or proceeding having been entered, filed, or taken, or of the negative thereof | Certificate | Impressed or adhesive | Forms of certificate with the impressed stamp will be sold at the Inland Revenue Office and by Law Stationers |

SEARCHES AND INSPECTIONS.

The fees on searches and inspections to be taken by means of impressed stamps on a form which will be issued at the Inland Revenue Office and sold there, and by Law Stationers.

EXAMINATION OF WITNESSES.

The fees under this heading may still be denoted by means of adhesive stamps, which may be affixed either to the deposition or to the order or application paper for examination.

HEARING.

| | Document to be stamped. | Character of Stamp to be used. | Regulations and Observations. |
|---|--|---|--|
| For entering or setting down, or re-entering or re-setting down, an appeal to the Court of Appeal, or a cause for trial or hearing in any Court in London or Middlesex, or at any Assizes, including a demurrer, special case, and petition of right, but not any other petition, nor a summons adjourned from chambers | In the Registry Office, Chancery Division, on forms provided for the purpose At offices of Associates, on copy of pleadings At all other offices of the High Court or Court of Appeal, on <i>præcipe</i> | Impressed Impressed or adhesive Impressed | Forms with the impressed stamp will be sold at the Inland Revenue Office, and at the Registrar's Office, Chancery Division |
| For certificate of an Associate of the result of trial | Certificate | Impressed or adhesive | |

JUDGMENTS, DECREES, AND ORDERS.

Schedule,
Ap. 22, 1876.

| | Document to be stamped. | Character of Stamp to be used. | Regulations and Observations. |
|--|-------------------------|--|---|
| For drawing up and entering a judgment, or decree or decretal order, whether on the original hearing of a cause or on further consideration, including a cause commenced by summons at chambers, and an order on the hearing of a special case or petition, and any order by the Court of Appeal | Judgment or order | Stamp to be impressed or adhesive on the judgment or order except at the Crown Office, where, as far as practicable a <i>præcipe</i> , with the impressed stamp should be used | |
| For drawing up and entering any other order, whether made in Court or at chambers | Order .. | Impressed or adhesive | |
| For copy of a plan, map, section, drawing, photograph, or diagram required to accompany any order | Copy .. | Impressed or adhesive | Where an adhesive stamp would damage the copy, a <i>præcipe</i> , with the impressed stamp, should be used. |

TAKING ACCOUNTS.

The fees payable under this heading when taken on the accounts to be denoted by means of adhesive stamps affixed to the accounts or by impressed stamps on paper to be left at the office, but when taken on a certificate they may be denoted either by impressed or adhesive stamps.

Schedule,
Ap. 22, 1876.

TAXATION OF COSTS.

| | Document to be stamped. | Character of Stamp to be used. | Regulations and Observations. |
|---|---|--------------------------------|-------------------------------|
| For taxing a bill of costs | Stamp to be adhesive on bill of costs, but where a certificate, <i>allocatur</i> , or <i>præcipe</i> is used, the fee to be denoted by impressed stamps | | |
| For a certificate or <i>allocatur</i> of the result, not being a judgment | Certificate, or <i>allocatur</i> | Impressed | |

PETITIONS.

| | Document to be stamped. | Character of Stamp to be used. | Regulations and Observations. |
|--|-------------------------|--------------------------------|-------------------------------|
| For answering a petition for hearing in Court, and setting down | Petition.. | Impressed or adhesive | |
| For answering a non-attendable petition, not being a petition for an order of course | Petition.. | Impressed or adhesive | |
| On a matter of course order, on a petition of right | Order .. | Impressed or adhesive | |
| On an order for a commission on a petition of right | Order .. | Impressed | |

REGISTER OF JUDGMENTS AND LIS PENDENS.

| | Document to be stamped. | Character of Stamp to be used. | Regulations and Observations. |
|---|---|--------------------------------|--|
| For registering a judgment or <i>lis pendens</i> For re-registering same.. For a search | { Memorandum of Registry General form of search <i>præcipe</i> Certificate | Impressed | { Forms with the impressed stamp will be sold at the Office of the Registrar of Judgments, Common Pleas Division |
| For a certificate of entry of satisfaction | | | |

Schedule,
Ap. 22, 1876.

| | Document to be stamped. | Character of Stamp to be used. | Regulations and Observations. |
|--|----------------------------|--------------------------------------|--|
| For a certificate of a judgment for registration in Ireland or Scotland under the Judgments Extension Act, 1868, including affidavit | } Certificate | { Impressed or adhesive | |
| On filing for registration a certificate issued out of Courts of Dublin or Court of Session in Scotland under the same Act | | | |
| On every certificate of the entry of a satisfaction under the same Act | | | |
| For a search made in one or both of the Registers of Irish and Scotch Judgments | <i>Præcipe</i> .. | Impressed | Forms of <i>præcipe</i> , with the impressed stamp will be sold at the Inland Revenue Office and by Law Stationers |

MISCELLANEOUS.

| | Document to be stamped. | Character of Stamp to be used. | Regulations and Observations. |
|--|---|--------------------------------------|----------------------------------|
| On a report of a Private Bill in Parliament | Report .. | Impressed | |
| On an allowance of byelaws or table of fees | Allowance | Impressed | |
| On a <i>fiat</i> of a Judge .. | <i>Fiat</i> .. | Impressed or adhesive | |
| On signing an advertisement | Advertisement | Impressed | |
| Upon a reference to a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions, for the purpose of any investigation or inquiry, other than the taking of an account for which another fee is herein provided | Certificate or other document used in giving the decision | Impressed or adhesive | |

**Schedule,
Ap. 22, 1876.**

| | Document to be stamped. | Character of Stamp to be used. | Regulations and Observations. |
|---|-------------------------|--------------------------------|---|
| On taking acknowledgment of a deed by a married woman | Acknowledgment | Impressed | Forms with the impressed stamp will be sold at the Inland Revenue Office |
| On taking a recognizance or bond | Recognizance | Impressed or adhesive | |
| On taking bail, and taking same off the file and delivering | Bail piece | Impressed or adhesive | |
| On a commitment .. | Commitment | } Impressed or adhesive | |
| On an application to produce Judges' notes | Application | | |
| On appointment of Commissioners under globe exchange | Appointment | Impressed | Forms of admission with the impressed stamp will be sold at the Inland Revenue Office |
| On examining and signing inrolment of decrees and orders | Inrolment | Impressed or adhesive | |
| On admission or re-admission of a solicitor | Admission | Impressed | |
| On a written request for information at the Chancery Pay Office | Præcipe .. | } Impressed | |
| For preparing a power of attorney at the Chancery Pay Office | Power .. | | |
| For transcript of an account in the books at the Chancery Pay Office | Transcript | Impressed or adhesive | These are to be IMPRESSED IF PRACTICABLE, where not filed in the office. |
| ANY OTHER PROCEEDING, PLEADING, OR DOCUMENT, NOT HEREINBEFORE SPECIFIED | Document or Præcipe | Impressed or adhesive | |

GENERAL DIRECTIONS.

In any case in which the use of impressed stamps is prescribed, paper or parchment, on which the document requiring a stamp is to be written,

may be stamped at the Inland Revenue Office, notwithstanding that stamped forms are also provided by the Commissioners of Inland Revenue. Schedule,
Ap. 22, 1876.
The cancellation shall be effected in such manner as the Commissioners of Inland Revenue shall from time to time direct.

CRICHTON.
J. D. H. ELPHINSTONE.
I concur in this Order,
CAIRNS, C.

MOTIONS UNDER ORDER XL. IN THE CHANCERY DIVISION.*

Notice.

HIGH COURT OF JUSTICE.—CHANCERY DIVISION.

The MASTER OF THE ROLLS and the VICE-CHANCELLORS have given directions that motions for judgment in actions shall not be brought on as ordinary motions, but shall be set down in the Cause Book.

They can be marked short, on production of the usual certificate of Counsel, and will then be placed in the Paper on the first Short Cause day after the day for which notice is given. If not marked short, they will come into the General Paper in their regular turn.

It will be advisable that the notices of motion for judgment should, if it is intended to mark them short, contain a statement to that effect, and also a statement that no further notice will be given of their having been so marked. Such statement will dispense with the necessity for giving defendants further notice that motions for judgment have been marked short.

Where a defendant makes his defence, and the plaintiff moves under Order XL., Rule 11, for such order as he is entitled to on the admissions of the defendant, the action need not be set down ; but if, on the motion being made, it appears that there must be a discussion or argument, it may be ordered to go into the General Paper, subject to any order for its being advanced.

R. H. LEACH,
Senior Registrar.

* W. N., 1876 (Notices), p. 233 (April 29th).

**New Rules.
June, 1876.**

RULES OF THE SUPREME COURT, JUNE, 1876.*

At a meeting of the Judges of the Supreme Court, held on the 26th of June, 1876, in pursuance of the Judicature Act, 1875. *Present*: The Right Honourable the Lord Chancellor, the Right Honourable the Lord Chief Justice of England, the Right Honourable the Master of the Rolls, the Right Honourable the Lord Chief Justice of the Common Pleas, the Right Honourable the Lord Chief Baron, the Right Honourable the Lord Justice James, the Right Honourable the Lord Justice Mellish, the Right Honourable Sir Richard Baggallay, the Right Honourable Sir James Hannen, Vice-Chancellor Malins, Vice-Chancellor Bacon, Vice-Chancellor Hall, Mr. Baron Bramwell, Mr. Justice Blackburn, Mr. Justice Mellor, Mr. Justice Lush, Mr. Baron Cleasby, Mr. Justice Grove, Mr. Justice Quain, Mr. Justice Denman, Mr. Justice Archibald, Mr. Baron Pollock, Mr. Baron Amphlett, Mr. Justice Field, Mr. Baron Huddleston, Mr. Justice Lindley.

The following new Rules of Court and alterations of existing Rules of Court were unanimously agreed to, and ordered to be in force on and after the 17th day of July, 1876:—

RULES.

1. These Rules may be cited as “The Rules of the Supreme Court, June 1876,” or each separate one of these Rules may be cited as if it had been one of “The Rules of the Supreme Court,” and had been numbered by the number of the Order and Rule mentioned in the margin.†

ORDER II.—WRIT OF SUMMONS AND PROCEDURE.

Order II.,
Rule 3a.

2. Forms 2 and 3 in Part 1 of Appendix (A) to “The Rules of the Supreme Court” shall be read as if the words “by leave of the Court or a Judge” were not therein.

ORDER V.—ISSUE OF WRITS OF SUMMONS.

Order V.,
Rule 8.

3. The following words are hereby added to the end of Order V., Rule 8, of “The Rules of the Supreme Court”:—

“And when such action shall be commenced in a District Registry, it shall be further distinguished by the name of such Registry.‡

ORDER IX.—SERVICE OF WRIT OF SUMMONS.

Order IX.,
Rule 6a.

4. Where one person, carrying on business in the name of a firm apparently consisting of more than one person, shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on, upon any person having at the time of service the control or management of the business there; and, subject to any of the Rules of the Supreme Court, such service shall be deemed good service on the person so sued.

* W. N., 1876 (Notices), p. 329. These new Rules of Court will be found inserted in their appropriate places in the Schedule to the Supreme Court of Judicature Act, 1875, *supra*.

† See the note to Rule 1 of the Rules of the Supreme Court, December, 1875, *supra*.

‡ This new Rule will be found inserted in its appropriate place in the Schedule to the Supreme Court of Judicature Act, 1875, *supra*, as “Order V., Rule 8a.”

ORDER XI.—SERVICE OUT OF THE JURISDICTION.

5. Whenever any action is brought in respect of any contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, when such contract was made or entered into within the jurisdiction, or whenever there has been a breach within the jurisdiction of any contract, wherever made, the Judge, in exercising his discretion as to granting leave to serve such writ or notice on a defendant out of the jurisdiction, shall have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local Court of limited jurisdiction, having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in England or in the place of such defendant's residence; and in all the above-mentioned cases no such leave is to be granted without an affidavit stating the particulars necessary for enabling the Judge to exercise his discretion in manner aforesaid, and all such other particulars (if any) as he may require to be shown.

Order XI.,
Rule 1a.

ORDER XII.—APPEARANCE.

6. Where any person, carrying on business in the name of a firm, apparently consisting of more than one person, shall be sued in the name of the firm, he shall appear in his own name; but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

Order XII.,
Rule 12a.

ORDER XVI.—PARTIES.

7. In any case in which the right of an heir-at-law or the next of kin or a class shall depend upon the construction which the Court may put upon an instrument, and it shall not be known or be difficult to ascertain who is or are such heir-at-law or next of kin or class, and the Court shall consider that, in order to save expense or for some other reason, it will be convenient to have the question or questions of construction determined before such heir-at-law, next of kin, or class shall have been ascertained by means of enquiry or otherwise, the Court may appoint some one or more person or persons to represent such heir-at-law, next of kin, or class, and the judgment of the Court in the presence of such person or persons shall be binding upon the party or parties or class so represented.

Order XVI.,
Rule 9a.

8. Any person carrying on business in the name of a firm apparently consisting of more than one person may be sued in the name of such firm.

Order XVI.,
Rule 10a.

ORDER XIX.—PLEADING GENERALLY.

9. In Order XIX., Rule 5, of "The Rules of the Supreme Court," the word "ten" is hereby substituted for the word "three" before the word "folios."

Order XIX.,
Rule 5a.

ORDER XXIII.—DISCONTINUANCE.

10. A defendant may sign judgment for the costs of an action if it is wholly discontinued, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued.*

Order XXIII.,
Rule 2.

ORDER XXXI.—DISCOVERY AND INSPECTION.

11. In Order XXXI., Rule 7, of "The Rules of the Supreme Court," the word "ten" is hereby substituted for the word "three" before the word "folios."

Order XXXI.,
Rule 7a.

* This new Rule will be found inserted in its appropriate place in the Schedule to the Supreme Court of Judicature Act, 1875, *supra*, as "Order XXIII., Rule 2a."

**New Rules,
June, 1876.**

ORDER XXXV.—PROCEEDINGS IN DISTRICT REGISTRIES.

**Ord. XXXV.,
Rule 1a.**

12. Order XXXV., Rule 1 of "The Rules of Supreme Court" is hereby annulled, and the following shall stand in lieu thereof:—

1. Where an action proceeds in the District Registry all proceedings, except where by any of the Rules of the Supreme Court it is otherwise provided, or the Court or a Judge shall otherwise order, shall be taken in the District Registry, down to and including final judgment, and every final judgment and every order for an account by reason of the default of the defendant or by consent shall be entered in the District Registry in the proper book, in the same manner as a like judgment or order in an action proceeding in London would be entered in London.

Where the writ of summons is issued out of a District Registry and the plaintiff is entitled to enter interlocutory judgment under Order XIII., Rule 6, or where the action proceeds in the District Registry and the plaintiff is entitled to enter interlocutory judgment under Order XXIX., Rule 4 or 5, in either case such interlocutory judgment, and, when damages shall have been assessed, final judgment shall be entered in the District Registry, unless the Court or Judge shall otherwise order.

Where an action proceeds in the District Registry, final judgment shall be entered in such Registry, unless the Judge at the trial or the Court or a Judge shall otherwise order.

Actions in the Queen's Bench, Common Pleas, and Exchequer Divisions shall be entered for trial with the Associates and not in the District Registries.

ORDER XXXVI.—TRIAL.

**Or. XXXVI.,
Rule 4a.**

13. The defendant, instead of giving notice of trial, may apply to the Court or Judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or a Judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the Court or Judge may seem just.

**Or. XXXVI.,
Rule 29a.**

14. The business to be referred to the Official Referees appointed under the Supreme Court of Judicature Act, 1873, shall be distributed among such Official Referees in rotation by the clerks to the Registrars of the Supreme Court, Chancery Division, in like manner in all respects as the business referred to Conveyancing Council appointed under the Act of the 15th and 16th Vict. cap. 80, section 41, is directed to be distributed by the second of the Consolidated General Orders of the Court of Chancery.*

**Or. XXXVI.,
Rule 29b.**

15. When an order shall have been made referring any business to the Official Referee in rotation, such order, or a duplicate of it, shall be produced to the Registrar's clerk, whose duty it is to make such distribution as aforesaid; and such clerk shall (except in the case provided for by Rule 29c of this Order) endorse thereon a note specifying the name of the Official Referee in rotation to whom such business is to be referred; and the Order so endorsed shall be a sufficient authority for the Official Referee to proceed with the business so referred.†

**Or. XXXVI.,
Rule 29c.**

16. The two last preceding Rules of this Order are not to interfere with the power of the Court, or of the Judge at chambers, to direct or transfer a reference to any one in particular of the said Official Referees, where it appears to the Court or the Judge to be expedient; but every such refer-

* This new Rule will be found inserted in the Schedule to the Supreme Court of Judicature Act, 1875, as "Order XXVI., Rule 29b," *supra*.

† Order XXXVI., Rule 29c, *supra*.

ence or transfer shall be recorded in the manner mentioned in Rule 2 of the second of the said Consolidated General Orders, and a note to that effect be endorsed on the order of reference or transfer; and in case any such reference or transfer shall have been or shall be made to anyone in particular of the said Referees, then the clerk in making the distribution of the business according to such rotation as aforesaid shall have regard to any such reference or transfer.*

**New Rules,
June, 1876.**

ORDER XLII.—EXECUTION.

17. Order XLII., Rule 10, of "The Rules of the Supreme Court" shall be read as if the words "or on behalf of" had been inserted after the words "signed by."†

ORDER LI.—TRANSFERS AND CONSOLIDATION.

18. When an order has been made by any Judge of the Chancery Division for the winding up of any company under the Companies Acts, 1862 and 1869, or for the administration of the assets of any testator or intestate, the Judge in whose Court such winding up or administration shall be pending shall have power, without any further consent, to order the transfer to such Judge of any action pending in any other Division brought or continued by or against such company, or by or against the executors or administrators of the testator or intestate whose assets are being so administered, as the case may be.

ORDER LIV.—APPLICATIONS AT CHAMBERS.

19. The authority and jurisdiction of the District Registrar or of a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions shall not extend to granting leave for service out of the jurisdiction of a writ of summons or of notice of a writ of summons.

RULES OF THE SUPREME COURT (COSTS).

20. The Schedule to "The Rules of the Supreme Court (Costs)" is hereby altered in the following particulars:—

The allowance for printing a document not exceeding ten folios shall be 10s., and, in addition, for every twenty beyond the first twenty copies of any document not exceeding twenty-four folios, 2s.

REVISING BARRISTERS.

ORDER IN COUNCIL OF JUNE 27TH, 1876, AS TO THE
APPOINTMENT OF REVISING BARRISTERS.‡

Whereas, by Order in Council, dated the 5th day of February, 1876,§ made in pursuance of section 23 of the Supreme Court of Judicature Act, 1875, the then existing Circuits were discontinued, and temporary||

* Order XXXVI., Rule 29d, *supra*.

† This new Rule will be found inserted in its appropriate place in the Schedule to the Supreme Court of Judicature Act, 1875, *supra*, as "Order XLII., Rule 10a."

‡ W. N., 1876 (Notices), p. 315. Full information with regard to Revising Barristers will be found in Rogers on Elections, 12th edition, 1876, pp. 167 to 180.

§ See that Order, *supra*.

|| Query.

Order in
Council, June
27, 1876.

arrangements directed whereby new Circuits were constituted, viz., the Northern Circuit, the North-Eastern Circuit, the Midland Circuit, the South-Eastern Circuit, the Oxford Circuit, the Western Circuit, and the North and South Wales Circuit, and provision was made for the issue of Commissions for the discharge of civil and criminal business in the county of Surrey, which was not included in any of the Circuits constituted as aforesaid.

And whereas, by Order in Council of the 17th of May, 1876, so much of the said Order of the 5th day of February, 1876, as limited the duration of the arrangements therein contained as to Circuits, and as to Sessions holden under Commissions for the discharge of civil and criminal business in the county of Surrey was revoked, and it was ordered that the said arrangement should continue to operate until modified or revoked by any subsequent Order in Council.

And whereas, by the said section of the Supreme Court of Judicature Act, 1875, it was provided that all enactments relating to the power of Her Majesty to alter the Circuits of the Judges, or places at which Assizes are to be holden, or the distribution of Revising Barristers amongst the Circuits, or otherwise enabling or facilitating the carrying the objects of the said section into effect, and in force at the time of the passing of the Supreme Court of Judicature Act, 1873, should, with the necessary variations, if any, apply, so far as they were applicable, to any alterations in or dealings with Circuits or places at which Assizes are to be holden, made, or to be made, under the section now in recital; and that if any such order were made for the issue of Commissions for the discharge of civil and criminal business in the county of Surrey, as before mentioned in the said section, that county should, for the purposes of the application of the said enactments be deemed to be a Circuit, and the Senior Judge for the time being so commissioned, or such other Judge as might be for the time being designated for that purpose by order in Council, should, in the month of July or August in every year, appoint the Revising Barristers for that county and the cities and boroughs therein, and that the expression "Assizes" in that section should be construed to include Sessions under any Commission of Oyer and Terminer, or Gaol Delivery, or any Commission in lieu thereof, issued under the Supreme Court of Judicature Act, 1873.

And whereas, by the 3rd section of the Revising Barristers Act, 1873,* it was enacted that Her Majesty, by Order in Council, might vary from time to time, either by way of increase or decrease, the number of Revising Barristers to be appointed for the counties, cities, boroughs, or places, in pursuance of s. 28 of the Parliamentary Electors' Registration Act, 1843, and that the number fixed by such Order should be substituted for the number fixed by the said section, or by any previous Order in Council made under the Revising Barristers Act, 1873, or any other Act.

It is therefore ordered by the Queen's Most Excellent Majesty, by and with the advice of Her Most Honourable Privy Council, that the number of Revising Barristers to be appointed for counties, cities, boroughs, or places shall be as set forth in the Schedule to this Order.

C. L. PEEL.

* 36 and 37 Vict. c. 70. This enactment was carried through the House of Commons by the writer. Lord Cairns took charge of it in the House of Lords.

SCHEDULE.

NUMBER OF REVISING BARRISTERS TO BE APPOINTED.

Schedule,
June 27, 1876.

For the county of Middlesex, and for the city of Westminster, and boroughs for the county of Middlesex,* 3; † for the counties, cities, boroughs, and places within the Northern Circuit, 8; within the North-Eastern Circuit, 10; within the Midland Circuit, 13; within the South-Eastern Circuit, 15; within the Oxford Circuit, 12; within the Western Circuit, 14 †; within the North Wales Division of the North and South Wales Circuit, 6 †; within the South Wales Division of the North and South Wales Circuit, 6 †; within the county of Surrey, 2. ‡

* The Lord Chief Justice of England appoints for these places; for other counties and boroughs, the Senior Judge on Circuit.

† This is the same number as was prescribed by s. 28 of the 6 Vict. c. 18.

‡ The leading statutes with regard to Revising Barristers are the 6 and 7 Vict. c. 18; 17 and 18 Vict. c. 94; 36 and 37 Vict. c. 70 (carried by the writer; it provides for evening sittings by the Revising Barrister in Parliamentary Boroughs containing more than 10,000 inhabitants); 37 and 38 Vict. c. 53.

APPELLATE JURISDICTION ACT, 1876.

39 & 40 VICTORIA, CHAPTER 59.

Act 1876. An Act for amending the Law in respect of the
Appellate Jurisdiction of the House of Lords;
and for other purposes.

[11th August, 1876.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

By section 20 of the Supreme Court of Judicature Act, 1873, it was provided that "No error or appeal shall be brought from any judgment or order of the High Court of Justice, or of the Court of Appeal, to the House of Lords, or to the Judicial Committee of Her Majesty's Privy Council."

Section 21 of the same Act gave Her Majesty power to "direct that all appeals and petitions whatsoever to Her Majesty in Council, which ought to be heard before the Judicial Committee of Her Majesty's Privy Council, shall, from and after a time to be fixed by Order in Council, be referred for hearing to and be heard by Her Majesty's Court of Appeal."

Section 55 of the same Act contained provisions for the hearing of appeals transferred from the Judicial Committee of the Privy Council to the Court of Appeal.

The 20th, 21st, and 55th sections of the Supreme Court of Judicature Act, 1873, were to have come in force on the 2nd of November, 1874; but the date was postponed till the 1st of November, 1875, by the "Supreme Court of Judicature (Commencement) Act, 1874," owing to the block in legislation at the close of the Session of 1874 rendering the passing of a supplementary measure, to amend the Supreme Court of Judicature Act, 1873, impossible. Act 1876.

In the autumn of 1874 the writer initiated a movement* for the preservation of the Appellate Jurisdiction of the House of Lords, which led, first, to the withdrawal of the proposal to extend the abolition of Appellate Jurisdiction of the House of Lords to Scotland and Ireland, and the passing, instead, of section 2 of the Supreme Court of Judicature Act, 1875, by which the provisions of sections 20, 21, and 55 of the Supreme Court of Judicature Act, 1873, were further postponed till the 1st of November, 1876.

By section 24 of the present Act, sections 20, 21, and 55 of the Supreme Court of Judicature Act, 1873, are finally repealed.

PRELIMINARY.

SECTION 1.—*Short Title.*

This Act may be cited for all purposes as "The Appellate Jurisdiction Act, 1876."

As the Bill originally stood, it dealt (almost) exclusively with the Appellate Jurisdiction of the House of Lords, and the constitution of the Judicial Committee of the Privy Council. During the progress of the Bill through the House of Commons, its scope was enlarged; and the measure deals not only with the Appellate Jurisdiction of the House of Lords and the constitution of the Judicial Committee of the Privy Council, but with the constitution of the High Court of Justice and Court of Appeal, with District Registries, and with appointments to legal and other offices.

* Partly by the formation of a Committee of Peers, Members of Parliament, and Queen's Counsel; partly by setting on foot a petition from the Bar of England to the Lord Chancellor.

Act 1876,
s. 1.

Notwithstanding the introduction of these new matters, the original title of the Bill has (wisely, perhaps) been retained. The phrase "Appellate Jurisdiction," it may be observed, in passing, is as applicable to provisions relative to the *Intermediate*, as it is to provisions relative to the *Final*, Court of Appeal; and there are only four sections of this Act which do not contain provisions relative to the "Appellate Jurisdiction," used in a comprehensive sense.

SECTION 2.—*Commencement of Act.*

This Act shall, except where it is otherwise expressly provided, come into operation on the first day of November, one thousand eight hundred and seventy-six, which day is hereinafter referred to as the commencement of this Act.

"Except where it is otherwise expressly provided." This qualifying proviso refers, more particularly, to sections 22 and 23, which, by express declaration, came into operation immediately "on the passing" of the Act, *i.e.*, on the 11th of August, 1876. The other sections, which authorise any steps to be taken before the "commencement" of the Act, are the 6th, 8th, 15th, and 17th.

The date fixed for the commencement of the Act is the same as that to which the "commencement" of sections 20, 21, and 55 of the Supreme Court of Judicature Act, 1873, was postponed by section 2 of the Supreme Court of Judicature Act, 1875. If a later date than the 1st of November, 1876, had been selected for the commencement of the present Act, the postponed sections of the Act of 1873 would then have come in force.

Section 17 of the present Act (with the exception of the making of Rules of Court under it) did not come in force till the 1st of December, 1876.

APPEAL.

SECTION 3.—*Cases in which Appeal lies to House of Lords.*

Subject as in this Act mentioned, an appeal

shall lie to the House of Lords from any order or judgment of any of the Courts following; that is to say : Act 1876,
s. 3.

“Subject as in this Act mentioned.” This refers to section 10, subject to “the consent of the Attorney-General, or other law officer of the Crown in any case where proceedings in error, or on appeal, could not hitherto have been had in the House of Lords, without the fiat or consent of such officer,” and also to section 11, “subject to such conditions as to the value of the subject-matter in dispute, and as to giving security for costs, and as to the time within which the appeal shall be brought, and, generally, as to all matters of practice and procedure, or otherwise, as may be imposed by Orders of the House of Lords.” The words refer, also, to section 13, excepting pending errors and appeals.

- (1.) Of Her Majesty’s Court of Appeal in England, and
- (2.) Of any Court in Scotland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by Common Law or by Statute; and
- (3.) Of any Court in Ireland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by Common Law or by Statute.

(1.) A question having been raised* as to whether appeals lay, between the 1st of November, 1875, and the 1st of November, 1876, from the Admiralty Division, under s. 2 of the Supreme Court of Judicature Act, 1875,† to the Privy Council or to the new Court of Appeal, the writer ventured to suggest that the appeal, in Admiralty causes, lay, first, to the new Court of Appeal, and, then,

* By “E. R.,” in the *Times* of Oct. 29th, 1875.

† See the note to that section, *supra*.

Act 1876,
s. 3.

from that Court to the House of Lords, this double appeal being substituted for the single appeal, under the old procedure, from the Court of Admiralty to the Privy Council. Agreeing with the writer that the appeal lay from the Admiralty Division to the new Court of Appeal, the *Solicitors' Journal* conceived that the writer "fell into a curious mistake" in supposing that a further appeal lay, in Admiralty causes, from the new Court of Appeal to the House of Lords. The point turned on the construction to be put upon the words "*similar* judgment, decree, or order," in s. 2 of the Supreme Court of Judicature Act, 1875. The question is now one of antiquarian interest only, but anyone who wishes to see the arguments *pro* and *con*, is referred to the letter of the writer in the *Times* of the 1st of November, 1875, and to the *Solicitors' Journal*, Vol. XX. (Nov. 6th, 1875), pp. 2 and 3; also, Vol. XIX. (Oct. 30th, 1875), p. 946. All doubt as to the future has been cleared up by the present section:—"An appeal shall lie from ANY order or judgment of Her Majesty's Court of Appeal in England."

Formerly, an appeal lay direct to the House of Lords from a decree or order of the Court of Chancery or of any of its Judges; but the right of so appealing only belonged to a party who had taken the precaution to have the decree "inrolled." By inrolment the decrees or orders of the Master of the Rolls or of the Vice-Chancellors became decrees or orders of the Lord Chancellor himself, and were thus subject to immediate review by the House of Lords. Any party, therefore, who was dissatisfied with a decree or order, and wished to have it reheard, either before the Judge who pronounced it, or before the Lord Chancellor or Lords Justices of Appeal in Chancery, by way of appeal, was obliged to take proper precautions to *prevent* the inrolment by entering a *caveat* or taking the necessary steps for a rehearing. The learning on the subject of the inrolment of decrees will be found in Macqueen's "*Appellate Jurisdiction of the House of Lords*,"* and in Daniel's "*Chancery Practice*."† The Consolidated Orders of the Court of Chancery, Order I.,

* Pp. 118-122.

† Chap. XXVI., s. IV., pp. 879-888 of the 1st volume, 5th edn., 1871. See also s. V.

(VI.), Rule 35; and Order XXIII., Rules 24, 25, 26, 27, 28, and 29, deal with the subject of the inrolment of decrees. Act 1876,
s. 3.

Owing to the provision of the present section that an appeal in English cases shall lie to the House of Lords from the Court of Appeal only, INROLMENT IS NOW A USELESS CEREMONY. In *Hastie v. Hastie*,* the decree, which was made after the 1st of November, 1875, had been inrolled, and the respondent took the preliminary objection that the Court of Appeal could not, consequently, hear the appeal. "What you are now contending for," said James, L.J., "is that the High Court of Justice, by inrolling its decrees, abridges the power of the Court of Appeal. Inrolment is now a useless ceremony." The Court of Appeal has no power, however, to order the inrolment to be "vacated." The power to do so is now vested solely in the Lord Chancellor.† The Lords Justices had power formerly to vacate an inrolment. *Hill v. The South Staffordshire Railway Company*.‡

(2.) Mr. Macqueen, in his learned work on "The Appellate Jurisdiction,"§ thus defines the Scottish Courts, "whose decrees or sentences are immediately reviewable by appeal to the House of Lords":—

"The first and chief is the Court of Session; a high tribunal of civil judicature, holden at Edinburgh by the Senators of the College of Justice; or, as they are more usually styled, 'the Lords of Council and Session.' The second is the Commission of Teinds; composed of the Judges of the Court of Session, and established for the 'Plantation of Kirks and Valuation of Tithes.' The third is Her Majesty's Court of Exchequer; erected in pursuance of the Articles of Union,|| for the determination of all questions affecting the Royal Revenues of Scotland. It was, indeed, at one time contended,¶ that an appeal lay

* 2 Ch. D., 304; 34 L. T., 747.

† *Allan v. The United Kingdom Electric Telegraph Company*, 24 W. R., 898; 2 Charley's Cases (Court), 10.

‡ 2 De G. and S., 230; 10 Jur. (N.S.), 531.

§ Page 285.

|| Article 19.

¶ That no appeal should lie to the House of Lords from the High Court of Justiciary is the more remarkable as the Judges of that Court are all Judges of the Court of Session.

Act 1876,
s. 3.

to the House of Lords from a fourth tribunal in Scotland, namely, the High Court of Justiciary, but this question has been long settled in the negative."

The first appeal presented to the House of Lords from Scotland was that of *the Earl of Roseberry v. Sir John Inglis*, Feb. 18th, 1707. The appeal was finally dismissed, for want of prosecution, thirteen years afterwards!*

The jurisdiction of the House of Lords to receive appeals from Scotland arose, by necessary implication, though not by express enactment, from the Act of Union. The right of the subject in Scotland to apply "for remeid of law" to "the King and Parliament" of that country had been firmly established prior to the Act of Union, and the Act of Union virtually substituted the jurisdiction of the British Parliament for that of the "Scots Parliament."†

Sir Islay Campbell, in his preface to the "Acts of Sederunt,"‡ observes:—"The great lawyers who have successively presided on the woolsack, or taken any charge of Scots business in the House of Lords, from the Union downwards, are well known to have been men of the highest talents, and fully adequate to so important a duty. This continues to be the case at present; and Scotland is, undoubtedly, very much beholden to them, for the lights which have been thrown upon its law by judgments of the House of Lords in many instances."

Among the petitions presented in favour of preserving the Appellate Jurisdiction of the House of Lords was one from the Scottish Advocates and one from the Writers to the Signet. Lord Moncrieff, speaking on the second reading of this measure in the House of Lords,§ said:—"I cannot, my Lords, refrain from saying that *the Profession in Scotland have been very well satisfied* with the administration of appeals in your Lordship's House." Lord Napier and Ettrick, in the course of an eloquent speech in Committee on the Bill||, said:—"The provisions of the Bill will be very acceptable to Scotland. The House of Lords stands in the place of the ancient Parliament of

* 20th March, 1720.

† See Macqucen's "Appellate Jurisdiction," pp. 288, 290, 293, 379.

‡ P. 36.

|| *Ib.*, p. 1288.

§ Hansard's Parliamentary Debates, 3rd series, vol. 227, p. 922.

Scotland, and in your Lordship's House by usage, if not by actual judicial functions, the whole of the ancient laws of Scotland are perpetuated and reproduced."

Act 1876,
s. 3.

(3.) In 1698 the Society of the Governor and Assistants of the New Plantation in Ulster presented a petition to the English House of Lords, complaining that the House of Lords in Ireland had asserted a right to review a decree made in their favour and against the Bishop of Derry by the Irish Court of Chancery. The English House of Lords came, after hearing Counsel for the bishop, to a resolution, that "the appeal to the House of Lords in Ireland was *coram non judice*, and that all the proceedings thereon are null and void; and that the Court of Chancery in Ireland ought to proceed in the cause as if no such appeal had been to the House of Lords there; and if either of the parties find themselves aggrieved by the said decree of Chancery in Ireland they are at liberty to pursue their proper remedy by way of appeal to this House."* The Bishop of Derry, to whom the House of Lords in Ireland had ordered possession of the lands in dispute to be given, contrary to the decree of the Irish Court of Chancery, submitted to the jurisdiction of the English House of Lords, and the Society was put in quiet possession of the lands under the decree.†

The English House of Lords acted with equal decision in 1717, when an appeal was presented to them complaining of a decree made by the House of Lords in Ireland, in the case of *Annsley v. Sherlock*, reversing several decrees made by the Irish Court of Exchequer. They passed a resolution that "the proceedings which have been had in this cause in the House of Lords in Ireland, were *coram non judice*, and null and void;" and, in obedience to their orders, the Barons of the Irish Exchequer issued process, enforcing the decree of that Court. "The right of the English House of Lords," says Mr. Macqueen,‡ "to review the proceedings of the Irish Courts of Justice was established by many precedents; and was ultimately con-

* Macqueen's "Appellate Jurisdiction," p. 787, citing the Lords' Journals.

† Macqueen, *ubi supra*, p. 788.

‡ *Ubi supra*, p. 92.

Act 1876,
s. 3.

ceded and confirmed by the reluctant acquiescence of the Irish Parliament.”

In 1783 the British Parliament* granted (or, perhaps, restored) to the Irish House of Lords the appellate jurisdiction from the Irish Courts of Justice. This jurisdiction the Irish House of Lords retained until 1800. By the Act of Union† this jurisdiction became finally vested in the House of Lords of the United Kingdom of Great Britain and Ireland.‡

The Irish Bar passed resolutions in favour of retaining the Appellate Jurisdiction of the House of Lords.

On the second reading of the Bill in the House of Lords Lord O'Hagan said§ :—“The measure is a graceful concession to the general opinion and desires of the three kingdoms, whose highest interests it so materially affects. It is right in principle, and sustains the time-honoured jurisdiction which your Lordships somewhat rashly consented to part with, and the changes proposed will give to this House, sitting judicially, a permanence, efficiency, and continuity of action such as it never before possessed.”

SECTION 4.—*Form of Appeal to House of Lords.*

Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty the Queen in Her Court of Parliament, in order that the said Court may determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal.

For the form of petition, see the Order of the 1st of November, 1876, *infra*.

* By the statute, 28 Geo. III. c. 28.

† Article 8.

‡ See Macqueen, *ubi supra*, p. 92.

§ Hansard's Parliamentary Debates, 3rd series, vol. 227, p. 924.

This section is very carefully worded. To understand it, a perusal of the speech of the Lord Chancellor, when presenting the present measure to the House of Lords,* is indispensable. It will be sufficient here to note that Lord Cairns follows the same view of the position of "the High Court of Parliament" as Lord Hale,† that the House of Lords has no "primitive independent inherent jurisdiction" in itself, but that its jurisdiction, like that of the other "High Courts" of this realm, flows from the Crown. In proof of this, Lord Cairns cited at large the language of the ancient writ of error, by which records were removed into Parliament from the Courts of Queen's Bench and Exchequer. The writ issued from the Sovereign, in the name of the Sovereign, and commanded the Chief of the Court below to send a transcript of the record "to Us in our present Parliament." The transcript of the record is described as being brought "*before our Lady the Queen and the Peers of this Realm in the present Parliament at Westminster,*" and the judgment is stated to be given by "THE COURT OF OUR LADY THE QUEEN IN HER PARLIAMENT HERE."

Act 1876,
s. 4.

This constitutional principle is enshrined in the present section by the introduction into it of the expression "before Her Majesty the Queen in Her Court of Parliament," and the very words of the ancient writ of error, "that the record being reviewed we may further cause to be done thereupon WHAT OF RIGHT AND ACCORDING TO THE LAW AND CUSTOM OF ENGLAND OUGHT TO BE DONE."

SECTION 5.—*Attendance of certain number of Lords of Appeal required at hearing and determination of Appeals.*

An appeal shall not be heard and determined by the House of Lords unless there are present at such hearing and determination not less than

* Hansard's Parliamentary Debates, 3rd series, vol. 227, pp. 203-222.

† See Lord Hale's "Jurisdiction of the Lords' House of Parliament."

Act 1876,
s. 5.

three of the following persons, in this Act designated Lords of Appeal; that is to say:—

The quorum of the House of Lords consists of three members of that House. By Standing Order CXXX. of the House of Lords, it is “ordered that three Lords be required to attend upon each of the days of hearing appeals and writs of error.”

It will be perceived that it is nowhere stated in this Act that the Appellate Jurisdiction is to be vested *exclusively* in the Lords of Appeal (except in the unlikely event of the hearing of an appeal during a dissolution, s. 9): the jurisdiction is therefore still substantially and not in name only, that of the House of Lords; “although,” as Lord Redesdale said in one of the debates on the Bill,* “the House has, with most commendable good sense, accepted the decision of the Law Lords.”

(1.) The Lord Chancellor of Great Britain for the time being; and

(2.) The Lords of Appeal in Ordinary to be appointed as in this Act mentioned; and

(3.) Such Peers of Parliament as are for the time being holding or have held any of the offices in this Act described as high judicial offices.

(2) See s. 6, *infra*.

(3) The “high judicial offices” are defined in s. 25 to be the office of Lord Chancellor of Great Britain and Ireland, or of paid Judge of the Judicial Committee of the Privy Council, or of Judge of the High Court of Justice, of the Court of Appeal, of the Court of Session, or of the Superior Courts of Law and Equity at Dublin.

SECTION 6.—*Appointment of Lords of Appeal in Ordinary by Her Majesty.*

For the purpose of aiding the House of Lords

* Hansard's Parliamentary Debates, 3rd series, vol. 227, p. 1287.

in the hearing and determination of appeals, Her Majesty may, at any time after the passing of this Act, by letters patent appoint two qualified persons to be Lords of Appeal in Ordinary, but such appointment shall not take effect until the commencement of this Act. Act 1876,
s. 6.

A person shall not be qualified to be appointed by Her Majesty a Lord of Appeal in Ordinary unless he has been at or before the time of his appointment the holder for a period of not less than two years of some one or more of the offices in this Act described as high judicial offices, or has been at or before such time as aforesaid, for not less than fifteen years, a practising barrister in England or Ireland, or a practising advocate in Scotland.

Every Lord of Appeal in Ordinary shall hold his office during good behaviour, and shall continue to hold the same notwithstanding the demise of the Crown, but he may be removed from such office on the Address of both Houses of Parliament.

There shall be paid to every Lord of Appeal in Ordinary a salary of six thousand pounds a year.

Every Lord of Appeal in Ordinary, unless he is otherwise entitled to sit as a member of the House of Lords, shall by virtue and according to the date of his appointment be entitled during his life to rank as a Baron by such style as Her Majesty may be pleased to appoint, and shall during the time that he continues in his office as

Act 1876,
s. 6.

a Lord of Appeal in Ordinary, and no longer, be entitled to a writ of summons to attend, and to sit and vote in the House of Lords; his dignity as a Lord of Parliament shall not descend to his heirs.

On any Lord of Appeal in Ordinary vacating his office, by death, resignation, or otherwise, Her Majesty may fill up the vacancy by the appointment of another qualified person.

A Lord of Appeal in Ordinary shall, if a Privy Councillor, be a member of the Judicial Committee of the Privy Council, and, subject to the due performance by a Lord of Appeal in Ordinary of his duties as to the hearing and determining of appeals in the House of Lords, it shall be his duty, being a Privy Councillor, to sit and act as a member of the Judicial Committee of the Privy Council.

Lord Redesdale, on the motion for going into Committee on the Appellate Jurisdiction Bill, made the following important remarks on the constitutional aspect of the new creation:—"The peerage which the Bill would introduce was not, as some persons erroneously supposed, a life peerage. It was an OFFICIAL PEERAGE, and analogous to that which, in the case of Bishops, had been known to the constitution from a very early period, and gave to the law a similar representation in the House to that which the Church had so long enjoyed." In the House of Commons, Mr. Serjeant Simon moved, in Committee on the Bill, to leave out the words, "during the time that he continues in his office as a Lord of Appeal in Ordinary, and no longer," with a view to enabling the Lords of Appeal in Ordinary to sit and vote as Life Peers. Sir George Bowyer pointed out that the Lords of Appeal in Ordinary would not, under this section, be *Peers at all*,

but only "*Lords of Parliament*," and, therefore, on precisely the same footing as the Lords Spiritual. If he resigned his office a Lord of Appeal in Ordinary would, like a Bishop who resigned, be no longer a member of the House of Lords, and would no longer be summoned to sit there. The amendment was negatived by a majority of 77—107 to 30.*

Act 1876,
s. 6.

SUPPLEMENTAL PROVISIONS.

SECTION 7.—*Pension of Lord of Appeal in Ordinary.*

Her Majesty may, by letters patent, grant to any Lord of Appeal in Ordinary, who has served for fifteen years, or is disabled by permanent infirmity from the performance of the duties of his office, a pension by way of annuity, to be continued during his life, equal in amount to the pension which might, under similar circumstances, be granted to the Master of the Rolls, in pursuance of the Supreme Court of Judicature Act, 1873.

Previous service in any office described in this Act as a high judicial office shall, for the purposes of pension, be deemed equivalent to service in the office of a Lord of Appeal in Ordinary under this Act.

The salary and pension payable to a Lord of Appeal in Ordinary shall be charged on and paid out of the Consolidated Fund of the United Kingdom, and shall accrue due from day to day, and shall be payable to the person entitled thereto, or to his executors and administrators, at such intervals in every year, not being longer than

* Hansard's Parliamentary Debates, 3rd series, vol. 231, pp. 759-765.

Act 1876,
s. 7.

three months, as the Treasury may from time to time determine.

The pension of the Master of the Rolls, under the 39 George III. c. 110, s. 7, 53 George III. c. 153, s. 1, and 6 George IV. c. 84, is £2,500 + £800 + £450 = £3,750. See section 14 of the Supreme Court of Judicature Act, 1873, and the note thereto.

As to what is a "high judicial office," see s. 25, *infra*.

The concluding paragraph of this section is similar to section 15 of the Supreme Court of Judicature Act, 1875, *supra*, as to the method of paying the salaries and pensions of the Judges of the Supreme Court of Judicature.

SECTION 8.—*Hearing and Determination of Appeals during Prorogation of Parliament.*

For preventing delay in the administration of justice, the House of Lords may sit and act for the purpose of hearing and determining appeals, and also for the purpose of Lords of Appeal in Ordinary taking their seats and the oaths, during any prorogation of Parliament, at such time and in such manner as may be appointed by order of the House of Lords made during the preceding Session of Parliament; and all orders and proceedings of the said House in relation to appeals and matters connected therewith during such prorogation, shall be as valid as if Parliament had been then sitting, but no business other than the hearing and determination of appeals and the matters connected therewith, and Lords of Appeal in Ordinary taking their seats and the oaths, as aforesaid, shall be transacted by such House during such prorogation.

Any order of the House of Lords may, for the purposes of this Act, be made at any time after the passing of this Act.* Act 1876,
s. 8.

The power of sitting "for the hearing of appeals only," "notwithstanding the prorogation of Parliament," was recommended to be conferred on the House of Lords by the Select Committee of that House in 1856.

On the 14th of August, 1876, the House of Lords resolved, on the motion of the Lord Chancellor, "That this House do meet on Tuesday, the 21st of November next, *for the purpose of hearing and determining appeals* and matters connected therewith, pursuant to the provisions of the Appellate Jurisdiction Act, 1876."†

SECTION 9.—*Hearing and Determination of Appeals during Dissolution of Parliament.*

If, on the occasion of a dissolution of Parliament, Her Majesty is graciously pleased to think that it would be expedient, with a view to prevent delay in the administration of justice, to provide for the hearing and determination of appeals during such dissolution, it shall be lawful for Her Majesty, by writing under Her Sign Manual, to authorise the Lords of Appeal, in the name of the House of Lords, to hear and determine appeals during the dissolution of Parliament, and for that purpose to sit in the House of Lords at such times as may be thought expedient; and upon such authority as aforesaid being given by Her Majesty, the Lords of Appeal may, during such dissolution, hear and determine appeals, and act in all matters

* See the new Standing Orders, Forms, and Instructions, made under this power, in the Appendix to the present Act, *infra*.

† Hansard's Parliamentary Debates, 3rd series, vol. 231, p. 1194.

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SECTION 10.—*Saving*
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Error," c. 2 (pp. 365-382)
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Attorney-General had not
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Attorney-General must be

SECTION 11.—*Procedure under Act to supersede all other Procedure.*

Act 1876,
s. 11.

After the commencement of this Act error shall not lie to the House of Lords, and an appeal shall not lie from any of the Courts from which an appeal to the House of Lords is given by this Act, except in manner provided by this Act, and subject to such conditions as to the value of the subject-matter in dispute, and as to giving security for costs, and as to the time within which the appeal shall be brought, and generally as to all matters of practice and procedure, or otherwise, as may be imposed by Orders of the House of Lords.

By section 20 of the Supreme Court of Judicature Act, 1873, it was provided that “no error shall be brought from any judgment or order of the High Court of Justice or of the Court of Appeal to the House of Lords.” This enactment was suspended till the 1st of November, 1876, by section 2 of the Supreme Court of Judicature Act, 1875; and, as that section (with the exception of so much of it as declared the day on which the Act was to commence) is repealed by section 16 of the present Act, as from the 1st of November, 1876, it became necessary to enact by the present section that “after the commencement of this Act, error shall not lie to the House of Lords.” This enactment is more sweeping than s. 20 of the Supreme Court of Judicature Act, 1873, as by that section error from the High Court of Justice and Court of Appeal only was prohibited, while by the present section error is no longer to lie to the House of Lords from any Court. Prior to this enactment, error lay to the House of Lords, not only from the High Court of Justice and Court of Appeal, but from all judgments of the Court of Exchequer Chamber in Ireland; from all such judgments of the Court of Queen’s Bench in Ireland as were not immediately re-

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Except in so far as Orders of the House of not lie to the House of Scotland or Ireland in an to the law or practice h have been reviewed by t

“Except in so far as may be authorised by Orders of the House of Lords.” This, probably, refers to Admiralty and Lunacy cases which previously would have gone to the Privy Council. The section must be read in connection with s. 3 (2) and (3), *supra*.

Act 1876,
s. 12.

SECTION 13.—*Provision as to pending business.*

Nothing in this Act contained shall affect the jurisdiction of the House of Lords in respect of any error or appeal pending therein at the time of the commencement of this Act, and any such error or appeal may be heard and determined, and all proceedings in relation thereto may be conducted in the same manner in all respects as if this Act had not passed.

This section, which is a transition clause, embodies saving provisions similar to those contained in the latter part of section 20 of the Supreme Court of Judicature Act, 1873.

AMENDMENT OF ACTS.

SECTION 14.—*Amendment of the Act of 34 & 35 Vict. c. 91, relating to the constitution of the Privy Council.*

Whereas by the Act of the Session of the thirty-fourth and thirty-fifth years of the reign of Her present Majesty, chapter ninety-one, intituled “An Act to make further provision for the despatch of business by the Judicial Committee of the Privy Council,” Her Majesty was empowered to appoint and did appoint four persons qualified as in that Act mentioned to act as members of the Judicial Committee of the Privy

SECTION 1, 2.

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Appeal in Ordinary.

Any Lord of Appeal in
pursuance of this section
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the advice of the Judicial Committee of Her Majesty's Privy Council or any five of them, of whom the Lord Chancellor shall be one, and of the Archbishops and Bishops being members of Her Majesty's Privy Council, or any two of them, make Rules for the attendance, on the hearing of ecclesiastical cases, as assessors of the said Committee, of such number of the Archbishops and Bishops of the Church of England as may be determined by such Rules.

Act 1876,
s. 14.

The Rules may provide for the Assessors being appointed for one or more year or years, or by rotation or otherwise, and for filling up any temporary or other vacancies in the office of Assessor.

Any Rule made in pursuance of this section shall be laid before each House of Parliament within forty days after it is made if Parliament be then sitting, or, if not then sitting, within forty days after the commencement of the then next session of Parliament.

If either House of Parliament present an Address to Her Majesty within forty days after any such Rule has been laid before such House, praying that any such Rule may be annulled, Her Majesty may thereupon by Order in Council annul the same, and the Rule so annulled shall thenceforth become void, but without prejudice nevertheless to the making of any other Rule in its place, or to the validity of anything which may in the meantime have been done under any such Rule.

are to be and are as members of the Privy Council."

Rules under the powers c issued by an Order in Council 1876, which see, *infra*.

The Archbishops and Bishops, were, under s. 16 of (3 & 4 Vict. c. 86), themselves Committee of the Privy Council appeals in ecclesiastical cases appealed by s. 24 of this Act, section, THE ARCHBISHOPS AND BISHOPS ASSESSORS of the Judicial Committee appeals in ecclesiastical cases

An attempt was made by the House of Commons, who disapproved the Judicial Committee in ecclesiastical authority in the eyes of the laity, the assistance of the episcopal Assembly after two rather close divisions

**SECTION 15.—Amendment
of Judicature Act
Her Majesty's Court of**

**Whereas† it is expedient
that Her Majesty's Court**

* The writer voted against this division there was a tie, and the f

hereinafter mentioned : Be it enacted, that there shall be repealed so much of the fourth section of "The Supreme Court of Judicature Act, 1875," as provides that the Ordinary Judges of Her Majesty's Court of Appeal (in this Act referred to as "the Court of Appeal") shall not exceed three at any one time.

Act 1876,
s. 15.

In addition to the number of Ordinary Judges of the Court of Appeal authorised to be appointed by "The Supreme Court of Judicature Act, 1875," Her Majesty may appoint three Additional Ordinary Judges of that Court.

The first three appointments of Additional Judges under this Act shall be made by such transfer to the Court of Appeal as is in this section mentioned of three Judges of the High Court of Justice, and the vacancies so created in the High Court of Justice shall not be filled up, except in the event and to the extent hereinafter mentioned.

Her Majesty may by writing, under her Sign Manual, either before or after the commencement of this Act, but so as not to take effect until the commencement thereof, transfer to the Court of Appeal from the following Divisions of the High Court of Justice, that is to say, the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division, such of the Judges of the said Divisions, not exceeding three in number, as to Her Majesty may seem meet, each of whom shall have been a Judge of any one or more of

Judge by letters patent.
transferred without his own

Every Additional Ordinary
Court of Appeal appointed
under the said Act shall be subject to the
twenty-nine and thirty-third
Court of Judicature Act
under an obligation to go
Commissioner under commission
other commissions authorized
pursuance of the said Act
in all respects as if he were
Court of Justice.

There shall be paid to
every Judge appointed in
in addition to the salary
he may receive as an Ordinary
Appeal,* such sum on account
Circuit or under such commission
may be approved by the
commendation of the Lord

Each of the Judges of
Justice, who is in pursuance

to the Court of Appeal by writing under the Sign Manual of Her Majesty, shall retain such officers as are attached to his person as such Judge, and are appointed and removeable by him at his pleasure, in pursuance of "The Supreme Court of Judicature Act, 1873," and the officers so attached shall have the same rank, and hold their offices by the same tenure, and upon the same terms and conditions, and receive the same salaries, and, if entitled to pensions, be entitled to the same pensions, and shall, as nearly as may be, perform the same duties, as if the Judges to whom they are attached had not been transferred to the Court of Appeal.*

Act 1876,
s. 15.

Subject as aforesaid, the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, for the time being in force in relation to the appointment of Ordinary Judges of Her Majesty's Court of Appeal, and to their tenure of office, and to their precedence, and to their salaries and pensions, and to the officers to be attached to such Judges, and all other provisions relating to such Ordinary Judges, shall apply to the Additional Ordinary Judges appointed in pursuance of this section in the same manner as they apply to the other Ordinary Judges of the said Court.

For the purpose of a transfer to the Court of Appeal under this section, service as a Judge in a Court whose jurisdiction is transferred to the

* See the " N.B." at the end of s. 35 of the Supreme Court of Judicature Act, 1875.

WHOSE JURISDICTION IS THE
Court of Justice or to the
be deemed to have been
Appeal.

"The appointment of Ordin
Appeal." See s. 4 of the Su
Act, 1875, *supra*.

"Their tenure of office." See

"Their precedence." See s.

Their salaries and pensions."

Principal Act, *supra*.

"The officers to be attach
ss. 79 and 84 of the same Act,

"The first three appointme
under this Act" were filled up
visions of the present section,
of Appeal from the Common J
Court of Justice of three Judg
Bramwell, B., Brett, J., and
may be added, performed the
them of "going Circuits."*

This section enacts that "
much of section 4 of the Su
Act, 1875, as provides the
Her Majesty's Court of Appe
any one time." The limit
graph of section 4 of the S
Act 1875 applies only to

Act 1876,
s. 15.

first Ordinary Judges" of the Court of Appeal were "the Lords Justices of Appeal in Chancery," namely, JAMES and MELLISH, L.JJ., "and one other person" whom "Her Majesty" was "pleased to appoint by letters patent," namely, Sir Richard Baggalay. By this section it is further provided that in addition to the number of Ordinary Judges of the Court of Appeal, authorised to be appointed by the third paragraph of section 4 of the Supreme Court of Judicature Act, 1875, "Her Majesty may appoint *three Additional* Ordinary Judges of that Court." Subject to the provision (already complied with) of the third paragraph of section 4 of the Supreme Court of Judicature Act, 1875, that the first Ordinary Judges of the Court of Appeal shall be the three persons therein indicated, and to the provisions of this section that "the *first three* appointments of Additional Judges" under this Act shall be made by such transfer as is in this section mentioned (which has also been complied with), there seems practically to be no limit to the number of Ordinary Judges of the Court of Appeal whom the Queen may appoint. If the intention was that there should be six Ordinary Judges of the Court of Appeal, and no more, *i.e.*, the three mentioned in the third paragraph of section 4 of the Supreme Court of Judicature Act, 1875, and the three mentioned in the second paragraph of this section, by far the neatest way of effectuating that intention would have been, instead of repealing the words "not exceeding three at any one time," to have repealed only the word "three," and have inserted "six" in its place. The general provision in the third paragraph of s. 4 of the Supreme Court of Judicature Act, 1875, is still in force. "There shall be so many Ordinary Judges of the Court of Appeal as Her Majesty shall from time to time appoint," and although there are still only six Ordinary Judges of Appeal, it is under this general provision, it is apprehended, that Mr. Cotton has recently been appointed a Lord Justice of Appeal in succession to Lord Justice Mellish.

SECTION 16.—*Orders in relation to conduct of business in Her Majesty's Court of Appeal.*

Orders for constituting and holding Divisional

Act 1876,
s. 16.

Courts of the Court of Appeal, and for regulating the sittings of the Court of Appeal, and of the Divisional Courts of Appeal, may be made, and, when made, in like manner rescinded or altered, by the President of the Court of Appeal with the concurrence of the Ordinary Judges of the Court of Appeal, or any three of them; and so much of section seventeen of "The Supreme Court of Judicature Act, 1875," as relates to the regulation of any matters subject to be regulated by Orders under this section, and so much of any Rules of Court as may be inconsistent with any Order made under this section, shall be repealed, without prejudice nevertheless to any Rules of Court made in pursuance of the section so repealed, so long as such Rules of Court remain unaffected by Orders made in pursuance of this section.

By section 12 of the Supreme Court of Judicature Act, 1875, the Court of Appeal (subject to the provisions contained in that section as to the necessary *quorum*) "may sit in two Divisions at the same time," and, practically, the Court of Appeal has sat in two Divisions, one at Westminster and the other at Lincoln's Inn, from its commencement.

By section 17 of the Supreme Court of Judicature Act, 1876, Rules of Court may be made "for regulating the sittings of the Court of Appeal, and of any Divisional Courts thereof, by a majority of the Judges of the Supreme Court, of whom the Lord Chancellor shall be one." (See section 17 of this Act, *infra*).

SECTION 17. — *Regulations as to business of High Court of Justice and Divisional Courts of High Court.*

On and after the first day of December, one

thousand eight hundred and seventy-six, EVERY ACTION AND PROCEEDINGS IN THE HIGH COURT OF JUSTICE, AND ALL BUSINESS ARISING OUT OF THE SAME, except as is hereinafter provided, SHALL, so far as is practicable and convenient, BE HEARD, DETERMINED, AND DISPOSED OF BEFORE A SINGLE JUDGE, and all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order (except as aforesaid, and always excepting any proceedings on appeal in the Court of Appeal), shall, so far as is practicable and convenient, be had and taken before the Judge before whom the trial or hearing of the cause took place : Provided nevertheless, that Divisional Courts of the High Court of Justice may be held for the transaction of any business which may for the time being be ordered by Rules of Court to be heard by a Divisional Court ; and any such Divisional Court when held shall be constituted of two Judges of the Court and no more, unless the President of the Division to which such Divisional Court belongs, with the concurrence of the other Judges of such Division, or a majority thereof, is of opinion that such Divisional Court should be constituted of a greater number of Judges than two, in which case such Court may be constituted of such number of Judges as the President, with such concurrence as aforesaid, may think expedient ; nevertheless the decisions of a Divisional Court shall not be invalidated by reason of such Court

Act 1876,
s. 17.

Act 1876,
s. 17.

being constituted of a greater number than two Judges ; and

Rules of Court for carrying into effect the enactments contained in this section shall be made on or before the first day of December, one thousand eight hundred and seventy-six, and may be afterwards altered, and ALL RULES OF COURT TO BE MADE AFTER THE PASSING OF THIS ACT, WHETHER MADE UNDER "THE SUPREME COURT OF JUDICATURE ACT, 1875, OR THIS ACT, SHALL BE MADE BY ANY THREE OR MORE OF THE FOLLOWING PERSONS, OF WHOM THE LORD CHANCELLOR SHALL BE ONE, NAMELY, THE LORD CHANCELLOR, THE LORD CHIEF JUSTICE OF ENGLAND, THE MASTER OF THE ROLLS, THE LORD CHIEF JUSTICE OF THE COMMON PLEAS, THE LORD CHIEF BARON OF THE EXCHEQUER, AND FOUR OTHER JUDGES of the supreme Court of Judicature, to be from time to time APPOINTED for the purpose BY THE LORD CHANCELLOR in writing under his hand, such appointment to continue for such time as shall be specified therein, and all such Rules of Court shall be laid before each House of Parliament within such time and subject to be annulled in such manner as is provided by "The Supreme Court of Judicature Act, 1875."

There shall be REPEALED on and after the first day of December, one thousand eight hundred and seventy-six, SO MUCH OF SECTIONS FORTY, FORTY-ONE, FORTY-TWO, FORTY-THREE, FORTY-

FOUR, AND FORTY-SIX of "The Supreme Court of
Judicature Act, 1873," AS IS INCONSISTENT WITH Act 1876,
 a. 17.
THE PROVISIONS OF THIS SECTION.

See the note to ss. 4 and 17 of the Supreme Court of Judicature Act, 1875.

The object of this new Rule is to abolish, "so far as is practicable and convenient," sittings *in banco*, and to assimilate the Common Law practice to the Chancery practice, with regard to single-Judge judicature. This section, like the 15th, was added at the instance of Sir Henry James, Q.C., in Committee on the Bill in the House of Commons. It must be read in connection with the important Rules of Court made under it, and styled "The Rules of the Supreme Court, December, 1876," inserted in their appropriate places, *supra*, and set out *in extenso*, *infra*.

The present section has not had a sufficiently long trial to enable the Profession to obtain an adequate view of the great revolution which it has achieved. The Common Law Judges, it is believed, are endeavouring loyally to carry it out.*

Where, by the present section any application ought to be made to, or any jurisdiction exercised by, the Judge before whom an action has been tried, if such Judge shall die or cease to be a Judge of the High Court, or if such Judge shall be a Judge of the Court of Appeal, or if for any other reason it shall be impossible or inconvenient that such Judge should act in the matter, the President of the Division to which the action belongs may either by a Special Order in any action or matter, or by a General Order applicable to any class of actions or matters, nominate some other Judge to whom such application may be made, and by whom such Jurisdiction may be exercised.†

* At first considerable difficulty was experienced in finding Courts at Westminster for the single Judges to sit in. See the *Times' Law Report*, January 15th, 19th, and 20th, 1877.

† Rule 9 of the Rules of the Supreme Court, December, 1876.

Act 1876,
s. 18.

SECTION 18.—*Power in certain events to fill vacancies occasioned in High Court of Justice by removal of Judges to Court of Appeal.*

Whenever any two of the said paid Judges of the Judicial Committee of the Privy Council have died or resigned, Her Majesty may, upon an Address from both Houses of Parliament representing that the state of business in the High Court of Justice is such as to require the appointment of an Additional Judge, fill up one of the vacancies created by the transfer herebefore authorised, by appointing one new Judge of the said High Court in any Division thereof; and on the death or retirement of the remaining two paid Judges of the said Judicial Committee Her Majesty may, upon the like Address, fill up in like manner another of the said vacancies, and from time to time fill up any vacancies occurring in the offices of Judges so appointed.

“Hereinbefore authorised.” See section 15 of this Act, *supra*. See also s. 14 of this Act, *supra*.

SECTION 19.—*Attendance of Judges of High Court of Justice on Court of Appeal.*

Where a Judge of the High Court of Justice has been requested to attend as an Additional Judge at the sittings of the Court of Appeal under section four of “The Supreme Court of Judicature Act, 1873,”* such Judge shall, notwithstanding that the period has expired during which he

* *Sic.* This is an error for “1875.”

attendance was requested, attended the sittings of the Court of Appeal for the purpose of giving judgment or otherwise in relation to any case which may have been heard by the Court of Appeal during his attendance on the Court of Appeal.

Act 1876,
s. 19.

This section is rendered necessary on account of the "Additional Judges" sitting *by rotation* for brief intervals in the Court of Appeal.

SECTION 20.—*Amendment of Judicature Acts as to Appeals from High Court of Justice in certain cases.*

Where by Act of Parliament it is provided that the decision of any Court or Judge the jurisdiction of which Court or Judge is transferred to the High Court of Justice is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice, or of any Judge thereof, to Her Majesty's Court of Appeal.

For illustrations of the cases in which it is enacted that the decision of the Court or Judge, whose jurisdiction is transferred, is to be final, and in which, therefore, the right of appeal from the High Court or Judge to the Court of Appeal is taken away by this section, see the note to s. 45 of the Principal Act, *supra*.

By the Matrimonial Causes Act, 1860, 23 & 24 Vict. c. 144, either party dissatisfied with the decision of the Judge Ordinary of the Court for Divorce and Matrimonial Causes, sitting alone, in granting or refusing any application for a new trial, which by virtue of that Act he is empowered to hear and determine, may, within 14 days after the pronouncing thereof, APPEAL TO THE FULL COURT, "WHOSE DECISION SHALL BE FINAL." In *Westhead v. West-*

Act 1876,
s. 20.

*head** the Court of Appeal held that, taking this enactment and the present section together, the Court of Appeal has no jurisdiction now to entertain an appeal from an order of the President of the Probate Division, sitting alone, refusing or granting an application for a new trial. The appeal still lies to the "full Court," which has not been abolished. This decision was come to on an *ex parte* application by the appellant, in November, 1876. In March, 1877, the Court of Appeal, in the case of *Robinson v. Robinson*,† after full argument, announced their intention of adhering to their decision in *Westhead v. Westhead*.

By s 55 of the Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85, either party dissatisfied with any decision of the Court for Divorce and Matrimonial Causes in any matter which, "according to the provisions aforesaid"‡ of that Act, may be made by the Judge Ordinary alone, may, three calendar months after the pronouncing thereof, APPEAL TO THE FULL COURT, WHOSE DECISION SHALL BE FINAL. The Court of Appeal in *Wallis v. Wallis*,§ decided in March, 1877 (on the day previous to *Robinson v. Robinson*), held that, taking this enactment and the present section together, the Court of Appeal has no jurisdiction now to entertain an appeal from an order of the President of the Probate Division granting alimony. The appeal still lies to the "full Court."

In *Gladstone v. Gladstone*,¶ which was decided on the same day as *Wallis v. Wallis*, the Court of Appeal held that s. 4 of the Matrimonial Causes Act, 1859, 22 & 23 Vict. c. 61, was only meant to extend the period during which an order relating to the custody, maintenance, and education of the children of the marriage might be made under s. 35 of the Matrimonial Causes Act, 1857, and not

* 2 P. D., 2; 25 W. R., 35.

† 2 P. D., 77; 36 L. T., 122.

‡ See, as to this expression, *Gladstone v. Gladstone*, 2 P. D., 143, cited *infra*.

§ 2 P. D., 141. As the order was made at chambers (21 & 22 Vict. c. 108, sec. 1), Baggallay, L.J., was of opinion that, apart from the present enactment, section 50 of the Principal Act was "fatal to this appeal."

|| See s. 32 of the Matrimonial Causes Act, 1857.

¶ 2 P. D., 143.

to give the power of making a new kind of order having different incidents from an order made under s. 35 of the Matrimonial Causes Act, 1857, and that therefore it was incorporated with "the provisions aforesaid," mentioned in s. 55 of that Act. The appeal, consequently, from such an order lay under that section and the present one to the "full Court," and not to the Court of Appeal.

Act 1876,
s. 20.

SECTION 21.—*Continuation until 1st January, 1878, of s. 34 of 38 & 39 Vict. c. 77, as to vacancies in legal offices.*

Whereas by section thirty-four of "The Supreme Court of Judicature Act, 1875," it is enacted that upon the occurrence of any vacancy in an office coming within the provisions of section seventy-seven of "The Supreme Court of Judicature Act, 1873," the Lord High Chancellor of Great Britain may, with the concurrence of the Treasury, suspend the making any appointment to such office for any period not later than the first day of January, one thousand eight hundred and seventy-seven, and may, if it be necessary, make provision in such manner as he thinks fit for the temporary discharge in the meantime of the duties of such office, and it is expedient to extend the said period as hereinafter mentioned: Be it therefore enacted as follows:

The said section shall be construed as if the first day of January, one thousand eight hundred and seventy-eight were therein inserted in lieu of the first day of January, one thousand eight hundred and seventy-seven.

This section is superseded by s. 6 of the Supreme Court of Judicature Act, 1877, *infra*, by which the time is extended to the 1st of January, 1879.

SECTION 22.—*Appointment of Deputy by District Registrar.*

A District Registrar of the Supreme Court of Judicature may from time to time, but, in each case, with the approval of the Lord Chancellor, and subject to such regulations as the Lord Chancellor may from time to time make, appoint a deputy, and all acts authorised or required to be done by, to, or before a District Registrar may be done by, to, or before any deputy so appointed:

IX., XII., XIII., XXXV., and I.
of the 12th of August, 1875, *sup*

This useful section came in force
1876. See s. 2 of this Act, *supra*

SECTION 23.—*Appointment
Judge, and officers of Vice.*

Whereas by "The Vice-Ad
1863," it is enacted, that "
"contained shall be taken t
"the Admiralty to appoint a
"any Judge, Registrar, Mar
"of any Vice-Admiralty Co
"warrant from the Admin
"patent issued under the se
"of Admiralty of England

And whereas since the c
Supreme Court of Judica
1875, doubts have arisen
exercise of the said power
it is expedient to remove
therefore enacted as follow

Any power of the Ad
cancel the appointment o

Judge, Registrar, Marshal, or other officer of a Vice-Admiralty Court, may, after the passing of this Act, be exercised by some writing under the hands of the Admiralty, and the seal of the office of Admiralty, and in such form as the Admiralty from time to time direct.

Act 1878,
s. 23.

Every appointment so made shall have the same effect, and every Vice-Admiral, Judge, Registrar, Marshal, and other officer so appointed shall have the same jurisdiction, power, and authority, and be subject to the same obligation, as if he had been appointed before the commencement of the Supreme Court of Judicature Acts, 1873 and 1875, under the seal of the High Court of Admiralty of England.

“Admiralty” in this section means the Lord High Admiral, or the Commissioners for executing his office, or any two of such Commissioners.

The appeal from the Court of Admiralty lies first to the Court of Appeal and then to the House of Lords; the appeal from the Vice-Admiralty Courts still goes direct to the Judicial Committee of the Privy Council.

REPEAL AND DEFINITIONS.

SECTION 24.—*Repeal of certain sections of the Church Discipline Act and of the Supreme Court of Judicature Acts.*

Section sixteen of the Act for better enforcing Church Discipline, passed in the session of the third and fourth years of the reign of Her present Majesty, chapter eighty-six, and sections

Act 1876,
c. 24.

twenty, twenty-one, and fifty-five of the Supreme Court of Judicature Act, 1873, and section two of the Supreme Court of Judicature Act, 1875, shall be repealed (with the exception of so much of section two as declares the day on which that Act is to commence).

S. 16 of the 3 & 4 Vict., c. 86, empowers the Archbishops and Bishops, who were Privy Councillors, to sit as Judges of Appeal on the Judicial Committee in ecclesiastical cases. Under s. 14 of this Act, *supra*, they will only be *Assessors* of the Judicial Committee in ecclesiastical cases; hence the repeal.

Section 20 of the Principal Act abolishes appeals to the House of Lords. Sections 21 and 55 provided for the transfer of appeals to the Privy Council and the Court of Appeal. All three sections were suspended by the first paragraph of s. 2 of the Supreme Court of Judicature Act, 1875, and are now repealed with the suspensory proviso.

SECTION 25.—*Definitions.*

In this Act, if not inconsistent with the context, the following expressions have the meaning hereafter respectively assigned to them; that is to say,

“ High judicial office ” means any of the following offices; that is to say,

The office of Lord Chancellor of Great Britain or Ireland, or of paid Judge of the Judicial Committee of the Privy Council, or of Judge of one of Her Majesty's Superior Courts of Great Britain and Ireland :

“ Superior Courts of Great Britain and Ireland ” means and includes,—

As to England, Her Majesty's High Court

Justice and Her Majesty's Court of Appeal, Act 1876,
s. 25.
and the Superior Courts of Law and Equity
in England, as they existed before the con-
stitution of Her Majesty's High Court of
Justice; and

As to Ireland, the Superior Courts of Law and
Equity at Dublin; and

As to Scotland, the Court of Session:

"Error" includes a writ of error or any pro-
ceedings in or by way of error.

As to "high judicial office," see s. 5 (3) of this Act,
supra.

•

A P P E N D I X

TO THE

APPELLATE JURISDICTION ACT, 1876

FORM OF APPEAL, METHOD OF PROCEDURE, AND STANDING ORDERS,

**APPLICABLE TO ALL APPEALS PRESENTED TO THE
HOUSE OF LORDS ON AND AFTER THE 1
DAY OF NOVEMBER, 1876.***

**Appendix,
Nov. 1, 1876.**

To the Right Honourable the Lords Spiritual and Temporal in Parliament assembled.

The humble petition and appeal of *A*.

Form of
Appeal
(Standing
Order No. I.)

Your petitioner humbly prays that the matter of the order (or orders, or judgment, or interlocutor) set forth in the Schedule hereto† (or, so far as therein stated to be appealed against) may be reviewed before Her Majesty the Queen in her Court of Parliament, and that the said order (or so far as aforesaid) may be reversed, varied, or altered, or that the petitioner may have such other relief (*if special relief be desired it can be so stated in the prayer*) in the premises as to Her Majesty the Queen, in Her Court of Parliament, may seem meet; and that (*here name the respondents*) may be required to lodge such printed case

* W. N., 1876 (Notices), p. 475. The Appellate Jurisdiction Act, 1876, received the Royal Assent on August 11th, 1876. These orders, &c. were issued on the 14th of the same month.

† The Schedule must set out the title of the parties to the cause or matter; and the decrees, orders, judgments, or interlocutors appealed against, and where the appeal is not against the whole decree the part appealed against must be defined.

as they may be advised, and the circumstances of the cause may require in answer to this appeal ; and that service of such order on the solicitors in the cause of the said respondents may be deemed good service. Appendix,
Nov. 1, 1876.

*To be signed by two Counsel.**

(Here insert Schedule.)

FORM OF SCHEDULE.

“ From Her Majesty’s Court of Appeal (England).

“ In a certain cause (or matter) wherein A. was plaintiff and B. was defendant.

“ The order appealed from is in the words following, viz. (set forth order complained of), or, the order referred to in the above prayer is in the words following, the portion appealed from being printed in italics (set forth order, the portion complained of being printed in italics).”

We humbly conceive this to be a proper case to be heard before your Lordships by way of an appeal.

To be signed by two Counsel.

A new form was substituted for this, as follows:—

*Standing
Order No. 11.*

FORM OF SCHEDULE.

“ From Her Majesty’s Court of Appeal (England).

“ In a certain cause (or matter) wherein A. was plaintiff and B. was defendant.

“ The order appealed from is in the words following, viz. (set forth order complained of in italics), or, the order referred to in the above prayer is in the words following, the portion appealed from being printed in italics (set forth order, the portion complained of being printed in italics, the portion not complained of being printed in Roman type.)”

We humbly conceive this to be a proper case to be heard before your lordships by way of appeal.

*To be signed by two Counsel. Standing
Order No. 11.*

* See Standing Order No. II.

Appendix,
Nov. 1, 1876.

Notice to
respondents,
to be written
on the last
page of the
appeal.

I , clerk to Messrs. , of , solicitor
for the appellants within named, hereby certify that on the
day of , I served Messrs. , of
solicitors for , the within-named respondents, with
correct copy of the foregoing appeal, and with a notice
that on the day of , or as soon after as con-
veniently may be, the petition of appeal would be presented
to the House of Lords on behalf of the appellant.*

This notice to the respondent of the time when an appeal is to be presented is required by Standing Order CVII. (9th April, 1812.)

A form of notice is given in Macqueen's Appellate Jurisdiction, p. (Practice on Appeals). At p. 127 the old form of certificate of notice given.

DIRECTIONS FOR AGENTS.

Method of Procedure.

Presentation
of the appeal.

Order of
service—see
Standing
Order No. III.

In accordance with the foregoing notice, the appeal printed on parchment (quarto size), in such form as will enable paper copies thereof to be hereafter bound up with the printed cases, is to be lodged in the Parliament Office for presentation to the House, and (if the House be then sitting, or, if not, on the next ensuing meeting of the House) an order thereon for service on the respondents or their solicitors, ordering the respondents to lodge copies in answer to the appeal, will be issued to the appellants' agents, such order, together with an affidavit of due service entered thereon, to be returned to the Parliament Office within the period granted to the appellant for lodging the printed case under Standing Order No. V.

"An order thereon." For the form, see Macqueen's Appellate Jurisdiction, p. 141 (Practice on Appeals, c. 7).

"An affidavit of due service." For the form see Macqueen's Appellate Jurisdiction, 142 (Practice on Appeals, c. 7).

* Not less than two clear days' notice to be given of intention to present an appeal.

Each appellant, where there are more than one, is required to enter into the recognizance. The appellants are required to submit to the Clerk of the Parliaments within one week after the date of the presentation of the appeal (unless the sum of two hundred pounds, as required by the Standing Order, be paid to the Receiver of Fees to the Parliament Office for payment into the fee fund of the House of Lords*) the names of the sureties who propose entering into the bond; and, in the event of a substitute being proposed to enter into the recognizance in lieu of the appellants, the name of such substitute. Two clear days' previous notice of the names so proposed (for bond and recognizance) is to be given to the solicitor or agent of the respondents, and at the time of submitting the said names to the Clerk of the Parliaments a certificate from the solicitor or agent of the appellants is to be lodged in the Parliament Office, certifying his belief in the sufficiency of the sureties and substitutes so proposed. At the termination of one week from the lodgment of such certificate, the bond and recognizances are to be issued to the solicitor or agent of the appellants for execution before a Commissioner appointed to administer oaths in the Supreme Court of Judicature in England, or a Commissioner appointed to administer oaths in Chancery in Ireland, or before a Justice of the Peace in Scotland. The bond and the recognizance (whether entered into by the appellants or by a substitute) to be returned to the Parliament Office within one week from the date of the issue thereof to the solicitor or agent of the appellants.

The solicitors of those respondents who purpose lodging printed cases in answer to the appeal should attend at the Parliament Office for the purpose of ascertaining the due

Appendix,
Nov. 1, 1876.

Security for
costs—see
Standing
Order No. IV.

* All drafts and cheques to be made payable to "House of Lords Fee Fund," and to be crossed "Bank of England, Western Branch."

**Appendix,
Nov. 1, 1876.**

execution of the recognizance and bond, and entering their names in the appearance book. (Notice of the meeting of the Appeal Committee is only sent to the solicitors of respondents who have thus signified their appearance in the cause.)

Printed cases
and Appendix
and "setting
down" cause
for hearing—
see Standing
Order No. V.

In English appeals six weeks' time, and in Irish and Scotch appeals eight weeks' time, from the date of the presentation of the appeal, is granted to all parties to lodge printed cases and the appendices thereto.*

In appeals in which the parties are able to agree in their statement of the subject-matter, it is optional to lodge a joint case with reasons *pro* and *con*, following the practice heretofore in use in Common Law appeals on a special case.

Appendix.

It is obligatory on the appellant, within the respective periods so limited as above, to lodge his printed cases, or the joint case before mentioned, and a printed appendix consisting of such documents, or parts thereof, used in evidence in the Court below, as may be necessary for reference on the argument of the appeal.

It is the duty of the appellant, with as little delay as possible after the presentation of the appeal, to furnish to the respondent a list of the proposed documents, and in due course a proof copy of the appendix. The proof is to be examined with the original documents by the respective solicitors of the parties. (Ten copies of the appendix, as soon as printed, to be delivered to the solicitor of the respondent.) The respondent is allowed to print any additional documents used in evidence in the Court below, which may be necessary for the support of his case on the argument of the appeal, such documents to be paged consecutively with the appendix. (The proof to be examined, as afore-

* Petitions for extension of time lodged during the Recess do not prevent the dismissal of an appeal. For Form of Petition, see Appendix (C), *infra*.

said, by the respective solicitors, and prints delivered to the solicitor of the appellant.)

Appendix,
Nov. 1, 1878.

The costs incurred in printing the appendix will, in the first instance, be borne by the appellant, and the cost of the additional documents by the respondent, but these costs will ultimately be subject to the decision of the House with regard to the costs of appeal.

The Case and Appendix must be printed quarto size, with seven or eight letters in the margin for facilitating reference, and should be submitted in proof to the clerks in the Judicial Office. Forty copies of the case and appendix are required to be lodged in the Parliament Office; and subsequently, on the lodgment of the respondent's case, ten bound copies (see directions in the Appendix hereto,* as to binding printed cases).

Signature of
Counsel to
case—see
Standing
Order No. V.

Where reference is made to a document printed in the appendix, the case must contain a marginal note of the page of the appendix containing such document.

There is no penalty on respondents who do not lodge their cases within the time limited by Standing Order No. V., but respondents can only appear at the bar on a printed case.

As soon as the printed cases of all parties and the Appendix thereto have been lodged, it is optional for either side to set down the cause for hearing, but it is obligatory on the appellant, upon the lodgment of his printed cases and the appendix, to set down the cause for hearing within the time limited by Standing Order No. V. (*ex parte* as to those respondents who have not already lodged printed cases, upon proof, by affidavit, of the due service of the before-mentioned "order of service" upon the respondents or their solicitors). A respondent who has lodged his printed cases is at liberty to set down the cause for hearing on the first sitting day after the expira-

* Appendix (B).

Appendix,
Nov. 1, 1876.

tion of the time limited by the Standing Order for lodging printed cases.

The cause will be then ripe for hearing, and will take its position on the effective cause list.

STANDING ORDERS APPLICABLE TO ALL APPEALS PRESENTED TO THE HOUSE OF LORDS ON OR AFTER THE 1st DAY OF NOVEMBER, 1876.*

STANDING ORDER I.

TIME LIMITED FOR PRESENTING APPEALS.

Ordered, that except where otherwise provided by statute, no petition of appeal be received by this House unless the same be lodged in the Parliament Office for presentation to the House within one year from the date of the last decree, order, judgment, or interlocutor appealed from.

Applicable to all decrees, &c., pronounced after the 1st day of Nov.. 1876.

In cases in which the person entitled to appeal be with the age of one and twenty years, or covert, *non compos mentis*, imprisoned or out of Great Britain and Ireland such person may be at liberty to present his appeal to the House, provided that the same be lodged in the Parliament Office within one year next after full age, discovery, coming of sound mind, enlargement out of prison, or coming into Great Britain or Ireland. But in no case shall any person or persons be allowed a longer time, on account of mere absence, to present an appeal, than five years from the date of the last decree, order, judgment, or interlocutor appealed against.

* The Lord Chancellor, on the 14th of August, 1876 (the day before the prorogation of Parliament), moved that these Standing Orders should regulate all appeals presented to the House of Lords, on and after the 1st of November, 1876. The motion was agreed to. It was ordered that these Standing Orders be entered on the Roll of Standing Orders and be printed and published. *Hansard's Parliamentary Debates*, vol. 231, p. 1194.

The regulations of the House contained no limitation of time for bringing writs of error.* By 10 and 11 Wm. III. c. 14, s. 1, however, "no judgment shall be reversed in error, unless the writ of error be brought and prosecuted with effect, within 20 years after such judgment is signed and entered."

Order I.,
Nov. 1, 1878.

"One year." By Standing Order CIII. (24th March, 1725), it was "ordered that no petition of appeal from any decree or sentence of any *Court of Equity* in England or Ireland or of any Court in Scotland shall be received by the House after *two years* from the signing and inrolling or extracting of such decree or sentence, and the end of *fourteen days*, to be accounted from and after the first day of the Session of the meeting of Parliament next ensuing the said two years."

Then follows the clause containing a saving as to persons under disability, which has been copied in the present new Standing Order almost word for word, "one year," however, being substituted for two years and 14 days after the first day of the Session next ensuing the two years.†

STANDING ORDER II.

APPEALS TO BE SIGNED AND CERTIFIED BY COUNSEL.

Ordered, that all petitions of appeal be signed, and the reasonableness thereof certified,‡ by two Counsel who shall have attended as Counsel in the Court below, or shall purpose attending as Counsel at the hearing in this House.

This is for the purpose of "*preventing the bringing of frivolous appeals.*" So stated in the Preamble to Standing Order CV. (3rd March, 1697), from which this new Standing Order is copied. The certificate of "reasonableness" is due to Lord Eldon.§

STANDING ORDER III.

ORDER OF SERVICE.

Ordered, that the "Order of Service" issued upon the presentation of an appeal for service on the respondent or his solicitor, be returned to the Parliament Office, together with an affidavit of due service entered thereon, within the time limited for the appellant to lodge his printed cases,

* Macqueen's Appellate Jurisdiction, p. 364 ("Practice on Writs of Error," c. 1).

† See, on the subject-matter of this Standing Order, Macqueen's Appellate Jurisdiction, pp. 107-117. ("Practice on Appeals," c. 2; "Time for Presentation.")

‡ See the Form of Certificate, *supra*.

§ Macqueen's Appellate Jurisdiction, 134 ("Practice on Appeals"). See also, *ib.*, 135-138.

Order III.,
Nov. 1, 1876.

unless within that period all the respondents shall have lodged their printed cases ; in default, the appeal to stand dismissed.

See, as to the " Order of Service," the " Method of Procedure " *supra*, and see as to " the time limited for the appellant to lodge his printed cases," the new Standing Order V., *infra*.

As to forms of the " Order of Service," and " Affidavit of due Service," see Macqueen's Appellate Jurisdiction, pp. 141, 142.

STANDING ORDER IV.

RECOGNIZANCE.

Ordered, in all appeals, that the appellant or appellants do give security to the Clerk of the Parliaments by recognizance to be entered into, in person or by substitute, to the Queen of the penalty of FIVE HUNDRED POUNDS, conditioned to pay the respondent or respondents all such costs as may be ordered to be paid by the House in the matter of the appeal: and further, that the appellant or appellants do procure two sufficient sureties, to the satisfaction of the Clerk of the Parliament, to enter into a joint and several bond to the amount of TWO HUNDRED POUNDS, or do pay in to the account of the fee fund of the House of Lords the sum of two hundred pounds ; such bond or such sum of two hundred pounds to be subject to the order of the House with regard to the costs of the appeal: Ordered, that within one week after the presentation of the appeal, the appellant or appellants do pay in to the account of the fee fund of the House of Lords the said sum of two hundred pounds, or submit to the Clerk of the Parliaments the names of the sureties proposed to enter into the said bond ; and, in the event of a substitute being proposed to enter into the said recognizance, the name of such substitute ; two clear days' previous notice of the names so proposed for bond and recognizance to be given to the solicitor or agent of the respondent : Ordered, that the said bond and the recognizance (whether entered into by the appellants or by a substitute) be returned to the Parliament Office, duly

executed, within one week from the date of the issue thereof to the solicitor or agent of the appellant or appellants. On default by the appellant or appellants in complying with the above conditions, the appeal to stand dismissed.

Order IV,
Nov. 1, 1876.

The first and the last sentences of this new Standing Order are copied from the Standing Order CVIII. (22nd June, 1829), with the substitution in the first sentence of £500 for £400.

See the "Method of Procedure," *supra*, which provides that the names of the sureties are to be submitted to the Clerk of Parliaments "within one week after the date of the presentation of the Appeal."*

The form of "Certificate of Sufficiency of Sureties" is given in Appendix (A), *infra*.

A form of recognizance is given in Macqueen's Appellate Jurisdiction, p. 144 (Practice on Appeals, c. 8).

STANDING ORDER V.

PRINTED CASES, TIME LIMITED FOR LODGING, AND FOR SETTING DOWN THE CAUSE FOR HEARING.

1. Ordered, that in English appeals the printed cases and the appendix thereto be lodged in the Parliament Office within six weeks from the date of the presentation of the appeal to the House; in Scotch and Irish appeals, within eight weeks; and the appeal set down for hearing on the first sitting day after the expiration of those respective periods (or as soon before, at the option of either party, as all the printed cases and the appendix shall have been lodged); on default by the appellant the appeal to stand dismissed.

By Standing Order CXVI. (12th July, 1811), the appellant and respondent were to lay the points of their cases upon the table of the House or deliver them to the Clerk of Parliaments "*within four weeks after the time appointed for the respondent to put in his answer to the appeal.*"

2.—SCOTCH APPEALS.

Ordered, that in all appeals from Scotland the appellant alone, in his printed case or in the appendix thereto, shall lay before this House a printed copy of the record as

* Under Standing Order CVIII., the recognizance of the appellant or appellants in English appeals had to be entered into within 8 days after the appeal had been received; in Scotch and Irish appeals within 14 days

Seder V.,
Nov. 1, 1876.

authenticated by the Lord Ordinary; together with a supplement containing an account, without argument or statement of other facts, of the further steps which have been taken in the cause since the record was completed, and containing also copies of the interlocutors or parts of interlocutors complained of; and each party shall in their cases lay before the House a copy of the case presented by them respectively to the Court of Session, if any such case was presented there, with a short summary of any additional reasons upon which he means to insist; and if there shall have been no case presented to the Court of Session, then each party shall set forth in his case the reasons upon which he founds his argument, as shortly and succinctly as possible.

This is copied *verbatim* from Standing Order CXVI. (12th July, 1811), with the addition after "printed case" of the words, "or in the appendix thereto."

3.—PRINTED CASES TO BE SIGNED BY COUNSEL.

Ordered, that all printed cases be signed by one or more Counsel, who shall have attended as Counsel in the Court below, or shall purpose attending as Counsel at the hearing in this House.

This is copied from Standing Order CXIV. (19th April, 1698).

The offence of affixing Counsels' names, without their authority, to the printed cases, has been severely punished by the House of Lords,* the guilty party being committed to the custody of the Black Rod for some days, and then reprimanded on his knees at the Bar.

STANDING ORDER VI.

CROSS-APPEALS.

Ordered, that all cross-appeals be presented to the House within the period allowed by Standing Order No. V. for lodging cases in the original appeal.

By Standing Order CIV. (8th March, 1763), a cross-appeal must have been presented by the respondent within a fortnight after putting in his answer to the original appeal.

Where the respondent conceives himself aggrieved by any part of any decree or order made in the cause, he presents a cross-appeal.

See Macqueen's Appellate Jurisdiction, pp. 183-188 (Practice on

The original and cross appeals are treated by the House of Lords as substantially *one cause*.*

Order VI..
Nov. 1, 1876.

STANDING ORDER VII.

EXPIRY OF TIME DURING RECESS.

Ordered, with regard to appeals in which the periods severally dating from the presentation of the appeal under Standing Orders Nos. III., IV., V, and VI., expire during the recess of the House, that such periods be extended to the third sitting day of the next ensuing meeting of the House.

"The next ensuing meeting." Under the old practice it was, of course, impossible that the House could meet during the recess. But see now s. 8 of the Appellate Jurisdiction Act, 1876, *supra*. See, also, Standing Order CXI. (28th March, 1735).†

STANDING ORDER VIII.

SUPPLEMENTAL CASES TO BE DELIVERED IN WHERE APPEALS ARE REVIVED OR PARTIES ADDED.

Ordered, that where any party or parties to an appeal shall die pending the same, subsequently to the printed cases having been lodged, and the appeal shall be revived against his or her representative or representatives as the person or persons standing in the place of the person or persons so dying as aforesaid, a supplemental case shall be lodged by the party or parties so reviving the same respectively, stating the order or orders respectively made by the House in such case.

The like rule shall be observed by the appellant and respondent respectively, where any person or persons, party or parties in the Court below, have been omitted to be made a party or parties in the appeal before this House, and shall, by leave of the House, upon petition or other-

* Macqueen's Appellate Jurisdiction, p. 225 (Practice on Appeals, c. 18, "Of Cross Appeals").

† As to which see *ib.*, pp. 169, 170.

Order VIII.,
Nov. 1, 1876.

wise, be added as a party or parties to the said appeal after the printed cases in such appeal shall have been lodged.

This is copied *verbatim* from Standing Order CXX. (20th March, 1823) with the substitution of "lodged" for "delivered to this House," and "delivered" (twice).

STANDING ORDER IX.

SCOTCH APPEALS. CERTIFICATE OF LEAVE OR DIFFERENCE OF OPINION TO BE SIGNED BY COUNSEL ON APPEALS.

Ordered, that when any petition of appeal shall be presented to this House from any interlocutory judgment of either Division of the Lords of Session in Scotland, the Counsel who shall sign the said petition, or two of the Counsel for the party or parties in the Court below, shall sign a certificate or declaration, stating either that leave was given by that Division of the Judges pronouncing such interlocutory judgment to the appellant or appellants to present such petition of appeal, or that there was a difference of opinion amongst the Judges of the said Division pronouncing such interlocutory judgment.

This is copied *verbatim* from Standing Order CVI. (9th April, 1812).

STANDING ORDER X.

TAXATION OF COSTS.

Ordered, that in all cases in which this House shall make any order for payment of costs by any party or parties in any cause without specifying the amount, the Clerk of the Parliaments or Clerk Assistant shall, upon the application of either party, appoint such person as he shall think fit to tax such costs, and the person so appointed may tax and ascertain the amount thereof, and shall report the same to the Clerk of the Parliaments or Clerk Assistant: And it is further ordered, that the same fees shall be demanded from and paid by the party applying.

plying for such taxation for and in respect thereof as are now or shall be fixed by any resolution of this House concerning such fees; and the said person so appointed to tax those costs may, if he thinks fit, either add or deduct the whole or a part of such fees at the foot of his report: And the Clerk of the Parliaments or Clerk Assistant may give a certificate of such costs, expressing the amount so reported to him as aforesaid; and the amount in money certified by him in such certificate shall be the sum to be demanded and paid under or by virtue of such order as aforesaid for payment of costs.

Order X.,
Nov. 1, 1876.

This corresponds to Standing Order CXXXVIII. (3rd April, 1835). The taxation of costs, instead of devolving on the Clerk of Parliaments or Clerk Assistant, is to devolve on "such persons as he shall think fit to appoint to tax such costs," who is to report to him "the amount thereof." The certificate is still to be given by the Clerk of Parliaments or Clerk Assistant.*

APPENDIX (A).

Certificate of Sufficiency of Sureties, &c.†

Lodged in the Parliament Office on the _____ day of _____ 18 ____.

In the House of Lords.

"*A. and others v. B. and others.*"

In compliance with Standing Order No. IV., I (we) submit the names of (*full name*) of (*address*) and (*full name*) of (*address*) { as fit and proper sureties } or, as a fit and proper substitute } to enter into the { bond } thereby required: and I (we) certify in { my } belief, that the said (*full name*) and the said (*full name*) { are each } worth upwards of { £200 } over and above { their } just debts.
{ his }

This certificate may be signed by the country solicitor or agent of the

I (we) certify that a copy of the above certificate and two clear days' notice of the intention to lodge the same in the Parliament Office has been served on the solicitors or agents of the respondents.

To be signed by the London solicitor or agent of the appellants.

* As to "Costs," see Macqueen's Appellate Jurisdiction, pp. 266-271. "Practice on Appeals," c. 25, "Of Costs."

† See Standing Order IV., *supra*.

Appellant's case
Respondent B's case
Respondent C's case
Appendix.

4. The volume to be indented, and the number of the indentations to their respective cases.

5. References to the reports of the cases, and the words "Not reported," to be written on the

6. The bound copies to be lodged in the cases are delivered in.

The agents are requested to use their discretion in the volume, arrangement of the cases, and appearance of the cases, it may be found advisable to bind the volume, and also to divide the appellants' separate volumes.

It is the duty of the appellants' agent to :

APPENDIX

(Petition for Extension of Time)

(To be engrossed on foolscap paper, and (when obtained) a copy, and two clear days' be given to respondent's agent.)

In the House of Lords.

(Insert short title)

To the Right Honourable the Lords of the Council in Privy Council assembled

The humble petition of the appellants
Sheweth,

That your Petitioner presented
day of complaining of *(insert date and
plain of)*.

That the time allowed by Standing Order No. V. (*or*) extended by Appendix (C), your Lordships' order of the (*state date*) for the appellant to lodge his printed cases and the appendix, will expire on the (*state date*). Appendix (C),
Nov. 1, 1876.

That your Petitioner (*set forth cause of delay*).

Your petitioner therefore humbly prays that your Lordships will be pleased to grant him (*set forth time required*) further time to lodge his printed cases, and the appendix, and set down the cause for hearing. And your Petitioner will ever pray.

Agents for the appellant,

We consent to the prayer of the above petition.

Agents for the respondents.

ECCLESIASTICAL CASES.

ORDER IN COUNCIL UNDER THE APPELLATE JURISDICTION ACT, 1876.*

At the Court at Windsor, the 28th day of November, 1876.

PRESENT,

The QUEEN'S most Excellent Majesty.

Lord President.

Lord Chamberlain.

Earl of Derby.

Mr. Secretary Cross.

WHEREAS there was this day read at the Board a Representation, dated at the Council Chamber, Whitehall, on the 15th November instant, from the Right Honourable and Most Reverend the Archbishop of Canterbury, the Right Honourable and Most Reverend the Archbishop of York, the Right Honourable and Right Reverend the Bishop of London, the Right Honourable the Lord Chancellor, and the Right Honourable the Lords of the Judicial

* W. N., 1877, Notices, p. 57. The Order is dated the 28th of November, 1876.

Council,
Nov. 28, 1876.

Committee of Her Majesty's Privy Council, humbly recommending to Her Majesty that the following be the Rules under the Appellate Jurisdiction Act, 1876,* by which it is enacted that Her Majesty may, by Order in Council with the advice of the Judicial Committee of Her Majesty's Privy Council, or any five of them, of whom the Lord Chancellor shall be one, and of the Archbishops and Bishops being members of Her Majesty's Privy Council or any two of them, make Rules for the attendance on the hearing of Ecclesiastical Cases as Assessors † of the said Committee of such number of the Archbishops and Bishops of the Church of England as may be determined by such Rules, and that the Rules may provide for the Assessors being appointed for one or more year or years, or by rotation, or otherwise, and for filling up any temporary or other vacancies in the office of Assessor :—

“ I. The Archbishop of Canterbury, the Archbishop of York, and the Bishop of London, ‡ shall be *ex officio* Assessors of the Judicial Committee of Her Majesty's Privy Council, on the hearing of Ecclesiastical Cases, according to the following *rota*, that is to say, the Archbishop of Canterbury from this day until the 1st of January, 1877; the Archbishop of York from the 1st of January, 1877, till the 1st of January, 1879; and the Bishop of London from the 1st of January, 1879, until the 1st of January, 1880, and so on by a similar rotation for the period of one year each.

“ II. The other Bishops of Dioceses within the Province of Canterbury and York shall attend as Assessors of the Judicial Committee on the hearing of Ecclesiastical Cases.

* Section 14, *supra*. See the note to that enactment.

† The Archbishops and Bishops who were Privy Councillors were previously themselves members of the Judicial Committee of the Privy Council.

‡ These three Prelates have always been Privy Councillors.

according to the following *rota*, that is to say, from this day until the 1st of January, 1878, the four Bishops who on this day are the four junior Bishops for the time being; seniority for the purpose of this Order to be reckoned from the date of appointment to the Episcopal See; from the 1st of January, 1878, till the 1st of January, 1879, the four Bishops who on the 1st of January, 1878, shall be the four Bishops next in order of seniority; and from the 1st of January, 1879, till the 1st of January, 1880, the four Bishops who on the 1st of January, 1879, shall be the four Bishops next in order of seniority, and so on by a similar rotation, until the senior Bishop for the time being is reached, when the rotation shall be carried back to and again commenced with the junior Bishop.

Order in
Council,
Nov. 28, 1876.

“III. In the event of any one, or more than one, vacancy occurring in the office of Ecclesiastical Assessor, the vacancy or vacancies shall be filled up by the person or persons then next according to the rotations aforesaid.

“IV. A summons to attend on the hearing of every Ecclesiastical Case about to be heard before the said Judicial Committee shall be issued to the Five Ecclesiastical Assessors for the time being; and no such case shall be heard before the said Judicial Committee unless there are at least three of such Assessors present at the hearing: Provided that the Assessors present at the commencement of the hearing of any such Case shall continue to be the Assessors for that case until it shall be fully heard and disposed of, although their term of office, according to the rotation aforesaid, may in the meantime have expired: Provided also, that in the event of the death, resignation, or absence by reason of illness or other unavoidable cause, of any one of the Assessors present at the commencement of the hearing, the hearing of the Case may proceed so long as at least two Assessors are present.”

Her Majesty, having taken the said Representation into

Order in
Council,
Nov. 28, 1876.

consideration, was pleased, by and with the advice of E Privy Council, to approve the said Rules, made upon the recommendation of the Right Honourable and Most Reverend and Right Reverend Prelates, the Right Honourable Lord Chancellor, and the Right Honourable the Lords of the Judicial Committee as aforesaid, and to order, and is hereby ordered, that the same be punctually observed, obeyed, and carried into execution. Whereof the Most Reverend and Right Reverend the Archbishops and Bishops of Dioceses, within the Provinces of Canterbury and York, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

C. L. PE

RULES OF THE SUPREME COURT, DECEMBER, 1876.*

I, the Right Honourable Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, do hereby, in pursuance of the seventeenth section of the Appellate Jurisdiction Act, 1876, appoint Sir William Baliol Brett, Mr. Justice Lush, Mr. Baron Pollock, and Mr. Justice Manisty, to be the four Judges of the Supreme Court of Judicature, by whom, together with the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, Rules of Court for carrying into effect the enactments contained in the said section of the said Act shall be made as therein mentioned. And this appointment is to continue in force until the first day of January, 1878.

CAIRNS, C.

* W. N., 1876, Notices, p. 502. By s. 17 of the Appellate Jurisdiction Act, it is provided that Rules of Court shall be made on or before the 1st of December, 1876, for carrying into effect the enactments contained in that section. These rules will be found inserted in their appropriate places in the Schedule to the Supreme Court of Judicature Act, 1875.

All Rules of Court to be made after the passing of this Act, whether made under the Supreme Court of Judicature Act, 1875, or this Act, shall be made by any three or more of the following persons, of whom the Lord Chancellor shall be one, namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other Judges of the Supreme Court of Judicature, to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein." Appellate Jurisdiction Act, 1876, s. 17. For the former legislative body, see s. 17 of the Supreme Court of Judicature Act, 1875.

**New Rules,
Dec., 1876.**

RULES.

1. These Rules may be cited as "The Rules of the Supreme Court, December, 1876," or each separate Rule may be cited as if it had been one of the Rules of the Supreme Court, and had been numbered by the number of the Order and Rule mentioned in the margin.*

2. These Rules shall come into operation on the 1st December, 1876.

This is the date at which the 17th section of the Appellate Jurisdiction Act came into operation, so that these Rules must be read as if incorporated with that section.

ORDER XXXVI.

Trial.

3. Order XXXVI., Rule 22, is hereby repealed, and instead thereof the following Rule shall take effect:—

**Order
XXXVI.
Rule 22a.**

Upon the trial of an action the Judge may, at or after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or Judge.†

4. Where in any action in the Chancery Division the action or any question at issue in the action is ordered to

**Order
XXXVI
Rule 29a.**

* See the note to Rule 1 of the Rules of the Supreme Court, December, 1876.

† This and the following Rules should be read in connection with sections 40, 41, 42, 43, 44, and 46 of the Supreme Court of Judicature Act, 1875, and s. 17 of the Appellate Jurisdiction Act, 1876.

Order
XXXIX.
Rule 1.

5. Order XXXIX., Rule
instead thereof the following

Rule 1. Where, in an a
Common Pleas, or Excheq
trial by a jury, any applica
a Divisional Court. And w
Judge without a jury, the a
be to the Court of Appeal.*

Order
XXXIX.
Rule 1a.

6. Applications for new t
on the opposite party to sh
eight days from the date of
the case can be heard, w
directed. Such motion sh
following, unless the Court
time :—

An application to a Divi
the trial has taken place in
be made within four days
subsequent day on which a
application may be made
motions. If the trial has
London or Middlesex, the
the first four days of the n

ORDER XL.—MOTION FOR JUDGMENT.*

New Rules,
Dec., 1876.

7. Order XL., Rules 4 and 6 are repealed, and Rule 5 is repealed so far as it affects trials before a Judge; and the following Rule shall be substituted for Rule 4 :—

Order XL.
Rules 4, 5,
and 6.

4. Where, at or after the trial of an action by a jury, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the Judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them.

Order XL.
Rule 4.

Where, at or after the trial of an action before a Judge, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong.

An application under this Rule shall be to the Court of Appeal.

ORDER LVIIA.†—DIVISIONAL AND OTHER COURTS.

8. The following proceedings and matters shall continue to be heard and determined before the Divisional Courts; but nothing herein contained shall be construed so as to take away or limit the power of a single Judge to hear and determine any such proceedings or matters in any case in which he has heretofore had power to do so, or so as to require any interlocutory proceeding therein heretofore taken before a single Judge to be taken before a Divisional Court :—

Order LVIIA.
Rule 1.

* Order XL., Rule 4a, *supra*.

† This is an entirely new Order, and is inserted in the Schedule to the Supreme Court of Judicature Act, 1875, *supra*, in its appropriate place after Order LVII.

**New Rules,
Dec., 1876.**

Proceedings on the Crown side of the Queen's Bench Division.

Appeals from Revising Barristers, and proceedings relating to Election Petitions, Parliamentary and Municipal.

Appeals under section 6 of the County Courts Act, 1875.

Proceedings on the Revenue side of the Exchequer Division.

Proceedings directed by any Act of Parliament to be taken before the Court, and in which the decision of the Court is final.

Cases stated by the Railway Commissioners under the 36 and 37 Vict., c. 48.

Cases of Habeas Corpus, in which a Judge directs that a rule nisi for the writ, or the writ be made returnable before a Divisional Court.

Special cases where all parties agree that the same be heard before a Divisional Court.

Appeals from chambers in the Queen's Bench, Common Pleas, and Exchequer Divisions, and applications for new trials in the said Division where the action has been tried with a jury.

**Order LVII.
Rule 2.**

9. Where, by section 17 of the Appellate Jurisdiction Act, 1876, or by these Rules, any application ought be made to, or any jurisdiction exercised by the Judge before whom an action has been tried, if such Judge shall die or cease to be a Judge of the High Court, or if such Judge shall be a Judge of the Court of Appeal, or if any other reason it shall be impossible or inconvenient that such Judge should act in the matter, the President of the Division to which the action belongs may either by a Special Order in any action or matter, or by a General Order applicable to any class of actions or matters, nominate some other Judge to whom such application may be made and by whom such jurisdiction may be exercised.

10. Every Vacation Judge shall have the same power and authority as heretofore. New Rules,
Dec., 1878.

ORDER LVIII.—APPEALS FROM INFERIOR COURTS.*

11. Rule 16 of the Rules of the Supreme Court, December, 1875, is hereby repealed, and instead thereof the following provision shall take effect :— Order LVII.,
Rule 3a.
Order LVIII.,
Rule 19.

Every Judge of the High Court of Justice for the time being shall be a Judge to hear and determine appeals from Inferior Courts, under section 45 of the Supreme Court of Judicature Act, 1873. All such appeals (except Admiralty appeals from Inferior Courts, which until further order shall be assigned as heretofore to the present Judge of the Admiralty Court) shall be entered in one list by the Officers of the Crown Office of the Queen's Bench Division; and shall be heard by such Divisional Court of the Queen's Bench, Common Pleas, or Exchequer Division, as the Presidents of those Divisions shall from time to time direct.

Nothing in this Order shall affect the validity of any Rule[†] or Regulation heretofore issued with reference to such appeals by the Divisional Court formed under the said section.

CAIRNS, C.
A. E. COCKBURN.
G. JESSEL.
COLERIDGE.
FITZROY KELLY.
WM. BALIOL BRETT.†
ROBT. LUSH.†
C. E. POLLOCK.†
H. MANISTY.†

* This new Rule does not appear to have anything to do with the Appellate Jurisdiction Act, 1876, but only with s. 45 of the Supreme Court of Judicature Act, 1875.

† The four Judges appointed by the Lord Chancellor under s. 17 of the Appellate Jurisdiction Act, 1876, to carry out the provisions of that section. *Vide supra.*

Trial,
Dec., 1876.

NOTICES OF TRIAL.

CHANCERY DIVISION.

*Notice.**

The attention of Solicitors is called to the provisions in the Judicature Rules as to Notices of Trial;† as Notice of Trial can only be given after pleadings closed, the proper course, where there are no pleadings, is to set the action down on motion for judgment under Order XL. Rule 1.

R. H. LEACH,
Senior Registrar

CHANCERY REGISTRARS' OFFICE,
December, 1876.

APPOINTMENT OF DISTRICT REGISTRAR FOR
MANCHESTER.

ORDER IN COUNCIL.‡

Whereas by "The Supreme Court of Judicature Act, 1873,"§ it is enacted that it shall be lawful for Her Majesty, by Order in Council, from time to time to direct that there shall be District Registrars in such places as shall be in such Order mentioned for districts to be thereby defined, in which writs of summons for the commencement of actions in the High Court of Justice may be issued, and in which such proceedings may be taken and recorded as are hereinafter mentioned; and Her Majesty has thereby appointed that any Registrar of any County Court, or any Registrar or Prothonotary or District Prothonotary of any local Court whose jurisdiction is hereby transferred to the said High Court of Justice, or from whom an appeal is hereby given to the said Court of Appeal, or any person who, having been a District Registrar of the Court of Probate, or of the Admiralty Court, shall under this Act become and be a District Registrar of the said High Court of Justice, or who shall hereafter be appointed such District Registrar, shall and may be a District Registrar of the said High Court for the purpose of issuing such writs as aforesaid, and having such proceedings taken before him as are hereinafter mentioned:

And whereas Her Majesty, by and with the advice of Her Privy Council, did, on the 12th day of August, 1875, order that there should be District Registrars in certain places in England: ||

And whereas by the said Order it was ordered that there should be a District Registrar at Manchester, and the District Prothonotary at Manchester of the Court of Common Pleas at Lancaster was thereby appointed the District Registrar at Manchester:

And whereas by the death of the person who at the date of the said

* W. N., 1877, Notices, p. 58. This notice has frequently appeared tacked on to the notice as to motions under Order XL., *supra*

† See Order XXXVI., Rules 3 to 15, *supra*.

‡ W. N., 1876, Notices, p. 532.

§ Section 60, *supra*.

|| See this Order in Council, *supra*.

Order in Council held the office of District Prothonotary at Manchester of the said Court of Common Pleas, a vacancy has occurred in the said office, and such office being considered unnecessary, the Lord Chancellor, with the concurrence of the Treasury, and in pursuance of the power or authority in that behalf vested in him by the Supreme Court of Judicature Act, 1873* has abolished the same :

Order in
Council,
Dec. 9, 1876.

And whereas it seemeth fit to Her Majesty, by and with the advice of Her Privy Council, that further provision for the appointment of a District Registrar at Manchester should be made :

Now, therefore, Her Majesty, by and with the advice of Her Privy Council, is pleased to order, and it is hereby ordered, that Henry John Walker, the present Registrar of the County Court of Hampshire, holden at Southampton,† shall be and is hereby appointed District Registrar at Manchester for the district ordered to be the district for Manchester by the said Order in Council of the 12th day of August, 1875.

C. L. PEEL.

December 9, 1876.

BOROUGH OF LIVERPOOL.

PASSAGE COURT ORDERS AND RULES, SIGNED ON THE 22ND DAY OF DECEMBER, 1876.‡

1.—The provisions of “The Supreme Court of Judicature Acts, 1873 and 1875,” and such Orders and Rules made in pursuance thereof as are now in force, as well as any Orders or Rules which may hereafter be made and be in force for the time being, by virtue of the said Acts, shall [except as hereinafter is excepted or otherwise provided for] extend, and be applied to, and the forms therein mentioned shall be adopted and used in all actions, causes, and matters which at or after the time of the coming into operation of these Rules shall be within the cognizance of the Court of Passage of the Borough of Liverpool, but so far only as such provisions, Orders, Rules, and forms respectively are or may be applicable thereto, with such alterations as the nature of the action, the description of the Court, the character of the parties, or the circumstances of the case may render necessary, but any variance therefrom not being in matter of substance shall not affect their validity or regularity.§

2.—Provided always that all the Rules and Regulations of this Court

* Section 77, *supra*; s. 78, however, contemplates the existence of “successors” of “the” then “existing District Prothonotaries.”

† See s. 60 of the same Act, *supra*.

‡ See the note to s. 89 of the Principal Act, *supra*. These Rules, which were framed by the learned Assessor of the Court, Mr. Baylis, Q.C., afford a very useful example of a short method of adapting the Supreme Court of Judicature Acts, and the Orders and Rules of Court made under them, to an Inferior Court. Compare the new Rules of the Chancery of Lancaster, and the note to s. 95 of the Principal Act, *supra*.

§ Where there were no special Rules applicable to this Court, the practice was as nearly as might be conformable to the Rules and Practices of the Supreme Courts at Westminster. Rule 125 of the Rules of the Passage Court, 1853.

Rules,
22nd Dec.,
1876.

in force at the date hereof,* and so far as the same shall not be affected by, and do not conflict with, these Rules, shall remain in force.

3.—Every pleading may be either printed or written, or partly printed and partly written; † provided always, that in actions to recover a less sum than twenty pounds, and where such pleading shall contain less than 10 folios ‡ of 72 words each (every figure being counted as one word), the costs of such printing shall be in the discretion of the Registrar.

4.—That with reference to actions commenced when these Rules come into operation, where no declaration has been delivered at the time of the coming into operation of these Rules, § the action shall be continued according to these Rules.

5.—That in all other cases the action shall be continued up to the close of the pleadings, according to the practice of the Court of Passage existing before and up to the time of these Rules coming into operation, and afterwards according to these Rules, subject, however, to an order at the instance of either party to proceed at any stage according to the provisions of these Rules. ||

6.—The Assessor or Judge, Registrar and Deputy-Registrar, Sergeant-at-Mace, and other officers ¶ of the said Court of Passage, and their successors, shall, *mutatis mutandis* (subject to the Rules of the said Court), perform the same or the like duties, and exercise the same or like powers and authorities in respect of all actions, causes, and matters depending in the said Court of Passage at the coming into operation of these Rules, and also in respect of all actions, causes and matters which may afterwards be commenced in the said Court as at the coming into operation of these Rules may lawfully be performed and exercised by them respectively under any Act of Parliament for the time being in force with respect to the said Court, or under any other authority, subject to such appeal only as existed at the time of the coming into operation of these Rules, or which hereafter may exist.

7.—These Rules shall come into operation on and from the first day of January, 1877.

Signed by me, this 21st day of December, 1876,

T. HENRY BAYLIS, Assessor.

| | |
|-----------------------------------|---|
| We allow and confirm these Orders | } NATHL. LINDLEY. H. MANISTY. HENRY C. LOPES. |
| and Rules, this 22nd day of | |
| December, 1876. | |

* The Rules and Regulations, previously in force, were made on the 24th of October, 1853, in pursuance of "The Liverpool Court of Passage Procedure Act, 1853;" they annulled all previous Rules of Practice.

† Compare Order XIX., Rule 5, *supra*.

‡ See Order XIX., Rule 5a, Rules of the Supreme Court, June, 1875, *supra*.

§ This is in accordance with the notice of Mr. Justice Lush, at chambers, November 2nd, 1875, *supra*.

|| This is taken, also, from the notice of Mr. Justice Lush, at chambers on the 2nd November, 1875.

¶ Compare s. 77 of the Principal Act and Order LX., *supra*.

1877.

INTERLOCUTORY ORDERS.

THE COURT OF APPEAL, AT LINCOLN'S INN.*

Notice.

THE SENIOR REGISTRAR has been directed to give notice that, in future, appeals from interlocutory orders in any of the following cases will be set down for hearing in a separate list:—

1. On applications for injunctions, prohibitions, writs of *ne exeat regno*, or *certiorari*, and for stop orders on securities or documents in Court.

2. On applications for and relating to the appointment of receivers, managers, or official liquidators.

3. On applications for enlarging the time for redemption, for payment into Court, or for doing any other act, or for taking any proceedings.

4. On applications relating to wards or infants and the management of their property.

5. On applications relating to all matters of contempt and to the execution of decrees, judgments, and orders.

6. On applications relating to the discovery and inspection of documents.

7. And, generally, on all applications relating merely to matters of practice or procedure.

The Solicitor applying to set down any appeal in such list will be required to produce his notice of motion and certify at the foot thereof the class to which it belongs.†

R. H. LEACH,
Senior Registrar.

CHANCERY REGISTRARS' OFFICE,
29th January, 1877.

On November 10th, 1875, James, L.J., said‡ that, without then settling what was an interlocutory order, the Court of Appeal had determined that all *summonses which finally settled the rights of parties*, such as summonses under winding-up orders or in administration suits, would be heard by the full Court.

TRIALS BEFORE A JUDGE AND JURY IN CHANCERY ACTIONS.

Notice.§

In actions assigned to the Chancery Division, when the plaintiff under Order XXXVI., Rule 3, of the Rules of the Supreme Court, gives notice

* W. N., 1877 (Notices), p. 88.

† As to appeals from Interlocutory Orders, see Order LVIII., Rules 4, 14, and 15, and s. 12 of the Supreme Court of Judicature Act, 1875.

‡ 1 Ch. D., 41.

§ W. N., 1877 (Notices), p. 88.

Notice,
29th Jan.,
1877.

Notice,
February,
1877.

of trial before a Judge and jury, the action is to be entered for trial with the Associates instead of with the Chancery Registrar.*

Where, after the plaintiff has given notice of trial in any other manner and has set down the action in the Chancery Division, the defendant has under the provisions of the same Rule given notice that he desires to have the issues of fact tried before a Judge and jury, the action will be marked in the Cause Book "Jury trial at defendant's instance" on the request of the Solicitor for either party, and on the certificate of such Solicitor, that such notice has been duly given within the time, or extended time, referred to in Rule 3.

Actions which have been so marked will be added by the Associates to their list of actions for trial, upon the Solicitor for either party bringing to them the certificate of the Chancery Registrar in the form given below, annexed to the statement of claim. Such actions will be placed in the list in the order in which they are entered with the Associates.

R. H. LEACH,
Senior Registrar.

CHANCERY REGISTRARS' OFFICE,
February, 1877.

[*Reference to Record, and Short Title*].

I CERTIFY that this action was entered for trial in the Cause Book of the Chancery Division on the day of , and that it has been this day marked "Jury trial at defendant's instance" in accordance with a notice given by the defendant under Order XXXVI., Rule 3, of the Rules of the Supreme Court.

Dated the day of
for the Senior Registrar.

APPEALS FROM INFERIOR COURTS.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER DIVISIONS.

Orders of Court.

1. It is ordered that motions under the 6th section of 38 and 39 Vict. c. 50,† shall be made in the Queen's Bench, Common Pleas, and Exchequer Divisions only upon the days appointed for hearing appeals from Superior Courts, and no such motion shall be made by way of appeal from any County Court, unless a copy of the JUDGE'S NOTES, SIGNED BY THE JUDGE, shall have been handed to the proper officer in Court, unless otherwise ordered.

2. It is ordered that the party entering a special case under Order LVIII., Rule 19, at the Crown Office of the Queen's Bench Division, shall, four clear days before the day appointed for argument, deliver two

* See the note to Order XXXVI., Rule 29a, *supra*, and *Warner v. Murdoch*, *Murdoch v. Warner*, 4 Ch. D., 750; 46 L. J. (Ch.), 121; 35 L. T., 748. A Judge of the Chancery Division, *sitting as such*, cannot try an action with a jury.

† W. N., 1877 (Notices), p. 58. See the note to s. 45 of the Principal Act, and to Order LVIII., Rule 19, *supra*.

‡ County Courts Act, 1875.

copies of the case to the Judges of the Divisional Court, to which such cause has been assigned for argument, at the Judges' chambers, in Rolls Gardens, Chancery Lane, such copies to be marked "for the use of the Judges in the Queen's Bench [Common Pleas, or Exchequer] Division," and not with the name of any particular Judge, and to be divided into paragraphs and numbered, as in the special case. Such copies are to be forthwith forwarded to the proper Division at Westminster.

**Notices,
April, 1877.**

SITTINGS OF OFFICIAL REFEREES.*

Notice.

The Official Referees, Mr. Dowdeswell, Q.C., and Mr. H. W. Vorey, will in future hold their sittings at No. 32, Abingdon Street, Westminster, where all cases before them in London will be tried.

COPIES OF PLEADINGS.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Notice.

No causes or actions will in future be entered for trial, unless two copies of the whole pleadings are, pursuant to Rule 17 of Order XXXVI.† of the Rules of Court, 1875, delivered to the Officer at the same time.‡

* W. N., 1877 (Notices), p. 209. See, as to Official Referees, ss. 56 to 59, and s. 83 of the Principal Act; Order XXXVI., Rules 29a to 34; Order LXI., Rule 8, *supra*, and the new Order of 24th April, 1877, as to Official Referees' Fees, *infra*.

† W. N., 1877 (Notices), p. 209.

‡ Order XXXVI., Rule 17a, *supra*.

SUPREME COURT OF JUDICATURE ACT, 1877.

40 VICTORIA, CHAPTER 9.

An Act for amending the Supreme Court
Judicature Acts, 1873 and 1875.*

[24th April, 1877.]

Act 1877.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

There is no preamble to this Act; if one had been framed it might have run, "Whereas it is expedient to empower Her Majesty to appoint a Judge of the High Court of Justice in addition to the number of Judges that Court authorised to be appointed by the Supreme Court of Judicature Acts, 1873 and 1875, in order to facilitate the due administration of justice in the Chancery Division of that Court."

SECTION 1.—*Construction and Short Title of Act*

This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Supreme Court of Judicature Acts, 1873 and 1875, and together with the said Acts may be cited as "The Supreme Court of Judicature Act, 1873, 1875, 1877," and this Act may be cited

* This Act is largely due to the efforts of Mr. Osborn Morgan, Q.C.

separately as “The Supreme Court of Judicature Act, 1877.”

Act 1877,
s. 1.

See section 1 of the Supreme Court of Judicature Act, 1873, and section 1 of the Supreme Court of Judicature Act, 1875. This section is modelled on the latter.

SECTION 2.—*Appointment of Additional Judge of High Court of Justice.*

It shall be lawful for Her Majesty to appoint a Judge of the High Court of Justice in addition to the number of Judges of that Court authorised to be appointed by the Supreme Court of Judicature Acts, 1873 and 1875.

See, as to the number of Judges authorised to be appointed, section 5 of the Supreme Court of Judicature Act, 1873, section 3 of the Supreme Court of Judicature Act, 1875, and section 15 of the Appellate Jurisdiction Act, 1876, *supra*.

SECTION 3.—*Position of Additional Judge.*

The Judge appointed in pursuance of this Act shall be in the same position as if he had been appointed a Puisne Judge of the said High Court in pursuance of the Supreme Court of Judicature Acts, 1873 and 1875; and all the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, for the time being in force in relation to the qualification and appointment of Puisne Judges of the said High Court, and to their tenure of office, and to their precedence, and to their salaries and pensions, and to the officers to be attached to the persons of such Judges, and all other provisions relating to such Puisne Judges, or any

Act 1877,
s. 3.

of them, with the exception of such provisions as apply to existing Judges only, shall apply to the Additional Judge appointed in pursuance of this section in the same manner as they apply to the other Puisne Judges of the said Court respectively. The Judge appointed in pursuance of this Act shall be attached to the Chancery Division of the said High Court, subject to such power of transfer as is in the Supreme Court of Judicature Act, 1873, mentioned.

This section is modelled upon section 15 of the Appellate Jurisdiction Act, 1876, which relates to the appointment, &c., of three Additional Ordinary Judges of the Court of Appeal.

“Qualification.” See section 8 of the Supreme Court of Judicature Act, 1873, *supra*.

“Appointment.” See section 5 of the same Act, *supra*.

“Tenure of office.” See section 5 of the Supreme Court of Judicature Act, 1875, *supra*.

“Precedence.” See section 6 of the same Act, *supra*.

“Salaries.” See section 13 of the Supreme Court of Judicature Act, 1873.

“Pensions.” See section 14 of the same Act, *supra*.

“Officers attached to their persons.” See section 79 of the same Act, *supra*.

“Power of transfer.” By section 31 of the Supreme Court of Judicature Act, 1873, any Judge of any of the Divisions of the High Court may be transferred by Her Majesty, under Her Royal Sign Manual, from one to another of the Divisions.

SECTION 4.—*Style of Judges.*

And whereas it is expedient that a uniform style should be provided for the Ordinary Judges of the Court of Appeal and for the Judges of the High Court of Justice (other than the Presidents

of Divisions) : Be it enacted, that the Ordinary Judges of the Court of Appeal shall be styled “LORDS JUSTICES OF APPEAL,” and the Judges of the High Court of Justice (other than the Presidents of Divisions) shall be styled “JUSTICES OF THE HIGH COURT.”

Act 1877,
s. 4.

This section is a happy settlement of a long-standing controversy, respecting the proper mode of addressing the Judges of the High Court of Justice and Court of Appeal, respectively. Section 5 of the Supreme Court of Judicature Act, 1873, directed that the new Judges of the High Court should be styled *in their appointment* “JUDGE of the High Court of Justice,” but that they should be addressed in the manner which was *then customary* in addressing the Judges of the Superior Courts of Common Law. It is usual in private life to accost a Puisne Judge as simply “Judge”—(“Dear Judge” in a letter)—but it would be ridiculous so to address him in open Court. The 5th section would seem to sanction addressing him as “Mr. Justice,” or “*Mr. Baron.*” “*Mr. Justice*” will, in future, be the proper appellation of every Puisne Judge in open Court.

Mr. Baron Huddleston is “The Last of the Barons.”

The Supreme Court of Judicature Act, 1873, enacted that “the Ordinary and Additional Judges of the Court of Appeal shall be styled ‘LORDS JUSTICES OF APPEAL.’” On the Report of the Supreme Court of Judicature Bill, 1875, Sir Richard Baggallay, the then Attorney-General, moved to omit the word “Lords” before “Justices,” in clause 4 of that Bill, which was substituted for s. 6 of the previous measure, and he was, oddly enough, the first to receive the uncouth suffix, “J.A.” The *Times* reporters had the good taste to style him and also Sir George Bramwell, Sir Baliol Brett, and Sir Richard Amphlett, “LORD JUSTICE.” This, in future, is to be their Statutory style.

SECTION 5.—*Definition of Puisne Judge.*

A Puisne Judge of the High Court of Justice

Act 1877,
s. 6.

means, for the purposes of this Act, a Judge of the High Court of Justice other than the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron and their successors respectively.

See s. 5 of the Supreme Court of Judicature Act, 1875. The titles of the three Common Law Chiefs and of the Master of the Rolls, may, however, be abolished by Order in Council.*

SECTION 6.—*Continuation until 1st January, 1879, of s. 34 of 38 & 39 Vict. c. 77.*

Section thirty-four of the Supreme Court of Judicature Act, 1875, shall be construed as if the first day of January, one thousand eight hundred and seventy-nine were therein inserted in lieu of the first day of January, one thousand eight hundred and seventy-seven.

By the Appellate Jurisdiction Act, 1876, s. 21, the time was extended to the 1st of January, 1878.

OFFICIAL REFEREES' FEES.†

ORDER AS TO THE FEES TO BE TAKEN BY THE OFFICIAL REFEREES.

The Right Honourable Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, with the advice and consent of the undersigned Judges of the Supreme Court, and with the concurrence of the Lord

* Supreme Court of Judicature Act, 1873, s. 32.

† W. N., 1877 (Notices), p. 228. See the note to the Order of the 1st of February, 1876, *supra*, as to the Official Referees' fees.

Commissioners of Her Majesty's Treasury, doth hereby, in exercise of the powers for this purpose given by the Supreme Court of Judicature Act, 1875, and of all other powers and authorities enabling him in this behalf, rescind, as to all matters, questions, or issues which shall be referred to an Official Referee from and after the date hereof, the order as to the fees to be taken by the Official Referees made on the 1st day of February, 1876, and doth order and direct as follows :—

Order,
April 26,
1877.

From and after the date hereof, the fee to be taken by an Official Referee attached to the Supreme Court, in respect of all matters, questions, or issues referred to him by any order, shall be the sum of £5 for the entire reference, irrespective of the time occupied, which sum shall be paid before the reference is proceeded with.

Every such fee shall be collected by means of a stamp or stamps to be affixed to the appointment paper or summons issued by the Official Referee for appointing the time and place for proceeding with the reference.

Where the sittings under a reference are to be held elsewhere than in London, a convenient place in which the sittings may be held shall be provided to the satisfaction of the Official Referee, by and at the expense of the party proceeding with the reference; and there shall be paid, in addition to the above fee of £5, £1 11s. 6d. for every night the Official Referee, and 15s. for every night the Official Referee's clerk, is absent from London on the business of the reference, together with the reasonable expenses of their travelling from London and back.

A deposit on account of expenses may be required before proceeding with the reference, or at any time during the course thereof; and a memorandum of the amount deposited shall be delivered to the party making the deposit.

The fees and expenses and deposit (if any) hereby

Order,
April 24,
1877.

authorized in respect of any reference
first instance by the party proceeding

The Official Referees shall conform
that may be made from time to time
the accounting for all moneys received

Dated this twenty-fourth day of
eight hundred and seventy-seven.

CAIRN
JNO.
ROW
HEN

We certify that this order is made
of the Commissioners of Her Majesty's

J. D.
Row.

RULES OF THE SUPREME COURT

MAY, 1877.*

I, the Right Honourable Hugh
Cairns, Lord High Chancellor of Great Britain,
in pursuance of section 17 of the Act of 1876,
appoint Sir William Balguy, Mr. Baron Pollock, and Mr. Justice
the four Judges of the Supreme Court, and the Lord Chancellor
whom, together with the Lord Chancellor, the Master of
Justice of England, the Master of the High Court, the Chief Justice of the Common Pleas,
Baron of the Exchequer, Rules of the Supreme Court, and the
into effect the enactments contained in the said Act† shall be made as therein

* W. N., 1877 (Notices), p. 280

† These Rules are framed for the purpose of the
Supreme Court of Judicature Act, 1876.

this appointment is to continue in force until January 1, 1878. New Rules,
May, 1877.

CAIRNS, C.

RULES.

1. These Rules may be cited as "The Rules of the Supreme Court, May, 1877," or each separate Rule may be cited as if it had been one of the Rules of the Supreme Court, and had been numbered by the number of the Order and Rule mentioned in the margin.*

2. These Rules shall come into operation on June 1, 1877.

ORDER XIV.

LEAVE TO DEFEND WHERE WRIT IS SPECIALLY INDORSED. Order XIV.
Rule 1.

3. Order XIV., Rule 1, of the Rules of the Supreme Court, is hereby repealed, and the following Rule† is substituted :—

Where the defendant appears to a writ of summons specially indorsed under Order III., Rule 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, call on the defendant to show cause before the Court or a Judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. The copy of the affidavit shall accompany the summons or notice of motion. The Court or a Judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the Court or a Judge that he has a good defence to this action on the merits, or disclose such facts as may be deemed sufficient to enable him to defend, make an

* See the note to Rule 1 of the Rules of the Supreme Court, December, 1875.

† This new Rule will be found inserted in its appropriate place in the Schedule to the Supreme Court of Judicature Act, 1875, *supra*.

New Rules, order empowering the plaintiff to sign judgment accord-
May, 1877. - ingly.

CAIRNS, C.
 A. E. COCKBURN.
 G. JESSEL.
 COLERIDGE.
 FITZROY KELLY.
 WM. BALIOL BRETT.
 W. H. MANISTY.
 RT. LUSH.
 C. E. POLLOCK.

May, 1877.

RULES OF THE SUPREME COURT.

JUNE, 1877.

RULES.

1. These Rules may be cited as "The Rules of the Supreme Court, June, 1877," or each separate Rule may be cited as if it had been one of the Rules of the Supreme Court, and had been numbered by the number of the Order and Rule mentioned in the margin.†

2. These Rules shall come into operation on the 19th of June, 1877.

ORDER V.

Order V.,
 Rule 4a.

Subject to the power of transfer, and subject also to the power of the Lord Chancellor by Order from time to time otherwise to direct, every cause or matter which shall be commenced in the Chancery Division of the High Court shall be assigned to one of the Judges thereof by marking the same with the name of such of the same Judges as the plaintiff or petitioner may in his option think fit.

ORDER LI.

Order LI.,
 Rule 1a.

In the Chancery Division a transfer of a cause from one

* W. N., 1877 (Notices), p. 307.

† These new Rules will be found inserted in their appropriate places in the Schedule to the Supreme Court of Judicature Act, 1875.

Judge to another may by the same or a separate order be ordered to be made or to be deemed to have been made for the purpose only of trial or of hearing, and in such case the original and any further hearing shall take place before the Judge to whom the case shall be so transferred ; but all other proceedings therein, whether before or after the hearing or trial of the cause, shall be taken and prosecuted in the same manner as if such cause had not been transferred from the Judge to whom it was assigned at the time of transfer, and as if such Judge had made the decree or judgment, if any, made therein, unless the Judge to whom the cause is transferred shall direct that any further proceedings therein, before or after the hearing of trial thereof, shall be taken and prosecuted before himself or before an Official or Special Referee.

CAIRNS, C.

A. E. COCKBURN.

G. JESSEL.

ROBT. LUSH.

MR. JUSTICE FRY.

ORDER OF THE LORD CHANCELLOR.*

I, the Right Honourable Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, do hereby order and direct as follows :

I. Each of the several causes which have been or shall be transferred to Mr. Justice Fry shall, until further order, be deemed to have been transferred to him for the purpose only of trial or of hearing.

II. No cause or matter shall, until further order, be assigned to the said Mr. Justice Fry by the same being marked by the plaintiff or petitioner with the name of the said Mr. Justice Fry.†

Dated this 19th day of June, 1877. CAIRNS, C.

* This is a "direction" given by the Lord Chancellor under Order V., Rule 4a, *supra*.

† The necessity for this Order arose from Mr. Justice Fry having no Chamber Officials.

**Solicitors'
Act 1877.**

THE SOLICITORS' ACT, 1877.

40 & 41 VICT. C. 25.

An Act for regulating the Examination of persons applying to be admitted Solicitors of the Supreme Court of Judicature in England, and for otherwise amending the Law relating to Solicitors.

[July 23rd, 1877.]

WHEREAS under or by virtue of the enactments of the Act of the sixth and seventh years of the reign of Her present Majesty, chapter seventy-three, and of the Act of the twenty-third and twenty-fourth years of the same reign, chapter one hundred and twenty-seven, and of the Supreme Court of Judicature Acts, 1873 and 1875, relating to the admission of persons as solicitors of the Supreme Court, and of regulations made under the authority of those enactments, persons applying to be admitted as solicitors of the Supreme Court of Judicature in England are (with certain exceptions) required to pass examinations known respectively as the "preliminary," the "intermediate," and the "final" examination:

And whereas under the above-mentioned enactments the power of making regulations for the conduct of the said examinations and of appointing examiners is vested in certain Judges of Her Majesty's High Court of Justice:

And whereas it is expedient that such powers, subject as hereafter mentioned, be vested in the Incorporated Law Society, and that other amendments be made in the law relating to solicitors of the Supreme Court:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PRELIMINARY.

SECTION 1.—*Short Title and Construction of Act.*

This Act may be cited for all purposes as "The Solicitors' Act, 1877," and the Act of the sixth and seventh years of the reign of Her present Majesty, chapter seventy-three, "For consolidating and amending several of the laws relating to Attorneys and Solicitors practising in England and Wales," and the Act of the twenty-third and twenty-fourth years of the same reign, chapter one hundred and twenty-seven, "To amend the laws relating to Attorneys, Solicitors, Proctors, and Certificated Conveyancers," may be respectively cited for all purposes as "The Solicitors' Act, 1843," and "The Solicitors' Act, 1860," and this Act shall (so far as is consistent with the tenour thereof) be construed as one with the said Solicitors' Acts, 1843 and 1860, and with the other enactments for the time being in force relating to solicitors.

SECTION 2.—*Extent of Act.*

This Act shall not extend to Scotland or Ireland.

SECTION 3.—*Commencement of Act.*

This Act shall, so far as regards the power of certain of the Judges of Her Majesty's High Court of Justice and of the Incorporated Law Society,

to make regulations thereunder, and so far as regards the issue of notices and other proceedings preliminary to holding the first examinations thereunder, come into operation on the passing thereof, and for all other purposes shall come into operation on the first day of January, one thousand eight hundred and seventy-eight.

**Solicitors'
Act, 1877,
s. 3.**

SECTION 4.—*Interpretation.*

In this Act,—

“The Incorporated Law Society,” or “The Society,” means “The Society of Attorneys, Solicitors, Proctors and others not being Barristers, practising in the Courts of Law and Equity of the United Kingdom :”

“Solicitor” means solicitor of the Supreme Court of Judicature in England :

“Preliminary examination” means an examination in general knowledge of persons becoming bound under articles of clerkship to solicitors :

“Intermediate examination” means an examination of persons bound under articles of clerkship to solicitors, in order to ascertain the progress made by such persons during their articles in acquiring the knowledge necessary for rendering them fit and capable to act as solicitors :

“Final examination” means an examination of persons applying to be admitted as solicitors as well touching the articles and service as the fitness and capacity of such persons to act as solicitors, in all business and matters usually transacted by solicitors, and includes, where any allegation is made by the registrar of solicitors as to the moral unfitness of any such person to be an officer of the Supreme Court, an inquiry into the truth of such allegation.

EXAMINATIONS.

SECTION 5.—*Certificate of having passed examinations requisite for admission as Solicitor.*

Subject to the exemptions allowed by this Act, or by regulations made under the authority thereof, a person shall not be admitted as a solicitor unless he has obtained from the Incorporated Law Society, or some person authorised in writing by that Society, a certificate or certificates to the effect that he has passed a preliminary, an intermediate, and a final examination.

SECTION 6.—*Examinations to be held under management of Incorporated Law Society.*

The Incorporated Law Society are hereby authorised and required to hold, at least three times in the year, commencing with the first day of January, one thousand eight hundred and seventy-eight, and in every succeeding year, a preliminary examination, an intermediate examination, and a final examination, and the Society shall, subject to the provisions of this Act, have the entire management and control of all such examinations, and shall have power from time to time to make regulations with respect to all or any of the following matters ; (that is to say)—

(a.) With respect to the subjects for and the mode of conducting the examination of candidates ; and

(b.) With respect to the times and places of examinations and the notices of examinations ; and

**Solicitors'
Act, 1877,
s. 6.**

- (c.) With respect to the certificates to be given to persons of their having passed any examination; and
- (d.) With respect to the appointment and removal of examiners (other than the *ex-officio* examiners in this Act mentioned) and with respect to the remuneration by fees or otherwise of the examiners so appointed; and
- (e.) With respect to any other matter or thing as to which the society think it expedient to make regulations for the purpose of carrying this section into execution.

Any regulation made under the authority of this section may be altered or revoked by a subsequent regulation; and copies of all regulations made under the authority of this section shall be transmitted to the Presidents of the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division of the High Court of Justice, and to the Master of the Rolls, and if within twenty-eight days after a copy of any regulation has been so transmitted, any two of those judges (the Master of the Rolls being one) signify by writing under their hands, addressed to the president or the vice-president or secretary of the Society, their dissent from such regulation or any part thereof, the same shall be of no force or effect; and if after any such regulation or any part thereof has come into force any two of those judges (the Master of the Rolls being one) shall signify in manner aforesaid their dissent from such regulation or any part thereof the same shall, at the expiration of two months, cease to be of any force or effect.

SECTION 7.—*Masters of Queen's Bench, Common Pleas, and Exchequer Divisions to be ex-officio examiners.*

Unless and until the Presidents of the Queen's Bench Division, Common Pleas Division, and Exchequer Division of the High Court of Justice, and the Master of the Rolls otherwise order, the several Masters for the time being of those Divisions shall be *ex-officio* examiners for the intermediate and the final examinations, and one of such *ex-officio* examiners shall act in the conduct of every such examination in conjunction with the examiners appointed by the Society in pursuance of this Act.

SECTION 8.—*Fees payable to Incorporated Law Society in respect of examinations.*

Any person applying to be examined or re-examined at a preliminary, intermediate, or final examination shall pay to the Incorporated Law Society such fees in respect of such examinations (and in such proportions and at such times) as may be from time to time determined by regulations to be made by the Presidents of the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division of the High Court of Justice, and the Master of the Rolls, or any two of them, of whom the Master of the Rolls shall be one.

All moneys paid to the Society in pursuance of this Act in respect of the preliminary, intermediate, and final examinations shall be applied by the Society in payment of the expenses from time to time incurred by the Society with reference to such examinations, and with reference to the lectures, classes, and other teaching provided by the Society from time to time for persons bound or about to be bound under articles of clerkship to solicitors.

SECTION 9.—*Appeal to Master of the Rolls against refusal of Certificate.*

Any person who has been refused a certificate of having passed an

intermediate or final examination, and who objects to such refusal, whether on account of the nature or difficulty of the questions put to him by the examiners, or on any other ground whatsoever, shall be at liberty within one month next after such refusal to appeal by petition in writing to the Master of the Rolls against such refusal, such petition to be presented in such manner and subject to such regulations as the Master of the Rolls may from time to time direct.

In the meantime and until the Master of the Rolls otherwise directs, such petitions shall, as to a final examination, be presented at the Petty Bag Office without the payment of any fee, and a copy of such petition shall be left therewith and shall be delivered by the clerk of the Petty Bag to the secretary of the Incorporated Law Society, and the clerk of the Petty Bag shall also notify to such secretary the day appointed for the hearing of the petition, and the same shall be heard by the Master of the Rolls on such day after the expiration of fourteen days from the day on which such petition was presented and at such time as he may appoint.

On the hearing of any petition under this section the Master of the Rolls may make such order as to him may seem meet, and where any person who has been refused a certificate of having passed his final examination, on appeal to the Master of the Rolls, obtains an order for his admission, such order shall entitle him to a certificate from the Incorporated Law Society of his fitness and capacity to act as a solicitor, and in the usual business transacted by a solicitor, in the same manner as if he had passed his final examination.

SECTION 10.—*General exemptions from preliminary examination.*

A certificate of having passed a preliminary examination under this Act shall not be required from any person who has taken the degree of Bachelor of Arts or Bachelor of Laws in the Universities of Oxford, Cambridge, Dublin, Durham, or London, or in the Queen's University in Ireland, or the degree of Bachelor of Arts, Master of Arts, Bachelor of Laws, or Doctor of Laws in any of the Universities of Scotland (none of such degrees being honorary degrees), or who has been called to the degree of Utter Barrister in England, or who has passed the first public examination before moderators at Oxford or the previous examination at Cambridge, or the examination in arts for the second year at Durham, or who has passed one of the local examinations established by the University of Oxford, or one of the nongremial examinations established by the University of Cambridge, or one of the examinations of the Oxford and Cambridge Schools Examination Board, or one of the matriculation examinations at the Universities of Dublin or London (notwithstanding he may not have been placed in the first division of such matriculation examination), or the examination for the first-class certificate of the College of Preceptors incorporated by Royal Charter in 1849.

The Presidents of the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division of the High Court of Justice, and the Master of the Rolls, or any three of them (the Master of the Rolls being one) may make, and from time to time alter and revoke regulations extending the above exemption to any persons who pass any examination held in any of the above-mentioned universities or in the Owens College, Manchester, or in any other university, college, or educational institution, and specified in that behalf in the said regulations.

SECTION 11.—*Power of Judges to grant special exemptions from preliminary examination.*

The Presidents of the Queen's Bench Division, the Common Pleas

**Solicitors'
Act, 1877,
s. 11.**

Division, and the Exchequer Division of the High Court of Justice, and the Master of the Rolls, or any one or more of them, may, where under special circumstances they or he see fit so to do, exempt any person from compliance with the enactments and regulations for the time being in force with respect to the preliminary examination either entirely or partially, or subject to any such conditions as to them or him may seem fit.

SECTION 12.—*Exemption of certain Barristers from intermediate examination.*

Any person who has been called to the degree of Utter Barrister in England, and is of not less than five years' standing at the bar, and has procured himself to be disbarred with a view of becoming a solicitor, and has obtained from two of the benchers of the inn to which he belongs or to which he belonged a certificate of his being a fit and proper person to practise as a solicitor, shall not be required to obtain a certificate of having passed an intermediate examination under this Act, and shall be entitled on passing a final examination under this Act (except so much of such examination as relates to articles and service under articles) to be admitted and enrolled as a solicitor.

SECTION 13.—*Power of Judges to provide for admission in certain cases after four years' service.*

The Presidents of the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division of the High Court of Justice, and the Master of the Rolls, or any three of them (the Master of the Rolls being one), may make and from time to time alter and revoke regulations directing that any person having passed any examination held in the universities of Oxford, Cambridge, Dublin, Durham, or London, or in the Queen's University in Ireland, or in any of the universities in Scotland, or in the Owens College, Manchester, or in any other university, college, or educational institution, and specified in that behalf in such regulations, may be admitted and enrolled as a solicitor after service under articles of clerkship to a practising solicitor for the term of four years, but not so as to allow in any case a less term of service than four years.

SECTION 14.—*Time of Regulations coming into force.*

All regulations duly made by any of Her Majesty's judges or by the society in pursuance of this Act before the first day of January, one thousand eight hundred and seventy-eight, shall come into force on that day, and on that day the general rules and regulations, dated the second day of November, one thousand eight hundred and seventy-five, and the schedules thereto (with the exception of the regulations "As to re-admission and the taking out and renewal of certificates," and "As to custody of rolls and documents," and "Provisions as to notices, &c., already given,") shall cease to be of any force or effect.

MISCELLANEOUS AMENDMENTS OF LAW.

SECTION 15.—*Power for Master of Rolls to admit though service under Articles is irregular.*

Where any person articulated to a solicitor has not served as a clerk under such articles strictly within the provisions of The Solicitors' Act, 1843,

and the Solicitors' Act, 1860, and any Act amending the same, but subsequently to the execution of his articles *bond fide* serves (either continuously or not) one or more solicitors as an articulated clerk for periods together equal in duration to the full term for which he was originally articulated, and has obtained such certificates as he is required by this Act to obtain, it shall be lawful for the Master of the Rolls in his discretion, if he is satisfied that such irregular service was occasioned by accident, mistake, or some other sufficient cause, and that such service, although irregular, was substantially equivalent to a regular service, to admit such person to be a solicitor in the same manner as if such service had been a regular service within the meaning of the said Acts, and any Act amending the same.

Solicitors'
Act, 1877.
s. 15.

SECTION 16.—*Form of Registrar's Certificate.*

The annual certificate required by law to be obtained by every practising solicitor from the registrar of solicitors, and the declaration required to be delivered to the registrar for the purpose of obtaining such certificate, may respectively be in the Forms (A) and (B) in the first Schedule to this Act, or to the like effect.

SECTION 17.—*Solicitors eligible to practise in Ecclesiastical Courts.*

Any solicitor may practise in all courts and before all persons having or exercising power, authority, or jurisdiction in matters ecclesiastical in England, and shall be deemed to be duly qualified to practise and may practise in all matters relating to applications to obtain notarial faculties, and generally shall have and may exercise all the powers and authorities, and shall be entitled to all the rights and privileges, and may fulfil all the functions and duties which appertain or belong to the office or profession of a proctor, whether in the provincial, diocesan, or other jurisdictions in England.

SECTION 18.—*As to Commissioners for taking Oaths in Ecclesiastical Courts.*

Commissioners for taking oaths in the Supreme Court of Judicature in England shall be commissioners for taking oaths in or for the purpose of any of the ecclesiastical courts or jurisdictions, or matters ecclesiastical in England, or matters relating to application for notarial faculties.

SECTION 19.—*Council of Incorporated Law Society may act on behalf of Society.*

All rules and regulations, acts, matters, and things respectively authorised or required to be made or done by the Incorporated Law Society, under or in pursuance of this Act or of The Solicitors' Act, 1843, or of The Solicitors' Act, 1860, or under any orders, rules, and regulations made in pursuance thereof respectively, may be made or done by the Council for the time being of the Society on behalf of the Society.

SECTION 20.—*Authentication of Regulations and other documents.*

All rules, regulations, certificates, notices, and other documents made or issued by the Incorporated Law Society for any purpose whatever may be in writing or print, or partly in writing and partly in print, and may be signed on behalf of the Society by the secretary, or by such other officer or officers of the Society as may be from time to time prescribed by the Council.

**Solicitors'
Act, 1877,
s. 21.**

SECTION 21.—*Construction of Enactments referring to Attorneys and Examinations.*

All enactments referring to attorneys, which are in force immediately after the coming into operation of this Act, shall be construed as if the expression "solicitor of the Supreme Court" were therein substituted for the expression "attorney," and all enactments relating to the examinations of attorneys and solicitors which are in force immediately after the coming into operation of this Act shall be construed as relating to the examinations to be held in pursuance of this Act.

TEMPORARY PROVISION AND REPEAL.

SECTION 22.—*Temporary Provision as to Examinations.*

All persons who before this Act comes into operation have passed a preliminary but have not passed an intermediate or final examination, and all persons who have passed an intermediate but have not passed a final examination under the enactments and regulations hereby repealed, shall be deemed respectively to have passed a preliminary or a preliminary and intermediate examination under this Act as the case may be, and all persons who have passed a final examination under the said enactments and regulations but have not been admitted shall be deemed to have passed a final examination under this Act.

SECTION 23.—*Repeal of Scheduled Enactments.*

The Acts mentioned in the first part of the second Schedule to this Act are hereby repealed as from the first day of January, one thousand eight hundred and seventy-eight, to the extent specified in the third column in the said part of that Schedule, with the qualification that so much of the said Acts as is set forth in the second part of that Schedule shall be re-enacted in manner therein appearing, and shall be of the same force as if enacted in the body of this Act: Provided also, that this repeal shall not affect—

(a.) Anything duly done or suffered under any enactment hereby repealed; or

(b.) Any right, liability, or penalty acquired, accrued, or incurred under any enactment hereby repealed, or any legal proceeding or remedy in respect of any such right, liability, or penalty, and any such legal proceeding and remedy may be carried on as if this Act had not been passed;

And the regulations made by certain of the judges of the High Court of Justice in pursuance of the power contained in section 14 of the Judicature Act, 1875, for adapting the enactments and forms therein mentioned, shall as from the said first day of January, one thousand eight hundred and seventy-eight, cease to be of any force or effect.

THE SCHEDULES REFERRED TO IN THE FOREGOING ACT.

Solicitors'
Act, 1877,
Schedule 1.

THE FIRST SCHEDULE.

FORM (A.)

Registrar's Certificate.

No.

18

Pursuant to The Solicitors' Act, 1843, and the Acts amending the same, the Incorporated Law Society, as the registrar of solicitors, hereby certifies that

of the Supreme Court, whose place of business { are } at ,
 hath this day left with the secretary of the said Society a declaration in writing signed by (a) ,
 containing his name and place or places of business, together with the term and year, or the month and year in or as of which he was admitted, and hereby further certifies that the said solicitor is duly enrolled a solicitor of the Supreme Court, and is entitled to practise as such solicitor on this certificate being duly stamped as required by law.

Given under the hand of the secretary of the Incorporated Law Society this day of 18 .

Secretary.

Produced and entered this day of 187 .

(a) The said solicitor or the said solicitor's partner on his behalf or the said solicitor's London agent as the case may be. The name of the partner or agent need not be inserted here.

. If this Certificate is stamped after the 1st January, it must be produced to the registrar of solicitors within a month of the payment of the duty.

If admitted a notary this certificate should be entered at the Faculty Office; if a proctor it should be entered in the court in which he is admitted.

(FORM B.)

Declaration for obtaining the Registrar's Certificate.

No.

18 .

I hereby declare that was admitted an attorney of (a) , in

Term in the year 18 [or]
 a solicitor of the Supreme Court in the month of

in the year 18 and that { my } place of business { is }
 { his } { are }

as follows (b) :—

Dated this day of 18 .

Signature

[Partner or London Agent of the said]

To the Registrar of Solicitors.

(a) One court is sufficient.

(b) If removed since last certificate, state such removal.

Solicitors'
Act, 1877,
Schedule 2.

THE SECOND SCHEDULE.

PART I.

Enactments Repealed.

| Session and Chapter. | Title or Short Title. | Extent of Repeal. |
|--------------------------|---|--|
| 6 & 7 Vict. c. 73. | An Act for consolidating and amending several of the laws relating to attorneys and solicitors practising in England and Wales. | Sections 15, 16, 17, 18, 20, and so much of section 19 and of the Second Schedule as relates to fees payable to the Incorporated Law Society. |
| 23 & 24 Vict. c. 127. | An Act to amend the laws relating to attorneys, solicitors, proctors, and certificated conveyancers. | Sections 8, 9, 11, 13, 14, section 19 from the words "and after" to the end of the section; section 20 from the words "and the said Lords Chief Justices" to the words "from time to time"; section 23, and the Schedules (A) and (B). |
| 33 & 34 Vict. c. 28 | The Attorneys' and Solicitors' Act, 1870. | Section 20. |

PART II.

6 & 7 Vict. c. 73. s. 15.

If the Master of the Rolls or any of the judges of the Queen's Bench Division, the Common Pleas Division, or the Exchequer Division of the High Court of Justice is, by a certificate or certificates granted in pursuance of this Act, satisfied with respect to any person applying to be admitted a solicitor of the Supreme Court that such person is duly qualified to be admitted to act as a solicitor of the Supreme Court, then and not otherwise the Master of the Rolls shall administer the requisite oath and cause such person to be admitted a solicitor of the Supreme Court, and his name to be enrolled as a solicitor of such court, which admission shall be written on parchment and signed by the Master of the Rolls.

6 & 7 Vict. c. 73. s. 20.

Such person or persons as the Presidents of the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division of the High Court of Justice, jointly with the Master of the Rolls, shall for that purpose appoint shall have the custody and care of the rolls or books where persons are enrolled as solicitors of the Supreme Court, and shall be deemed and taken as the proper officer or officers for filing such affidavits as in The Solicitors' Act, 1843, are mentioned, and he or they is or are hereby also respectively required from time to time, without fee or reward other than as in the said Act mentioned, to enrol the name of every person

who shall be admitted a solicitor of the Supreme Court pursuant to the directions in the said Act, and the time when admitted, in alphabetical order, in rolls or books to be kept for that purpose, to which rolls or books all persons shall and may have free access without fee or reward.

**Solicitors'
Act, 1877,
Schedule 2.**

23 & 24 Vict. c. 127, s. 23.

If any solicitor of the Supreme Court, after having at any time taken out a stamped certificate, neglects for a whole year after the expiration thereof to renew the same for the following year, the registrar shall not afterwards grant a certificate to such solicitor, except under an order of the Master of the Rolls, and it shall be lawful for the Master of the Rolls to direct the registrar to issue a certificate to such person on such terms and conditions as he may think fit.



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